

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

ORIGINAL with Aff'd of Marling

75-1221

To be argued by
JOAN S. O'BRIEN

B
PJS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1221

UNITED STATES OF AMERICA,

Appellee,

—against—

CHARLES LUCCHETTI,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
*United States Attorney,
Eastern District of New York.*

PAUL B. BERGMAN,
JOAN S. O'BRIEN,
*Assistant United States Attorneys
Of Counsel.*

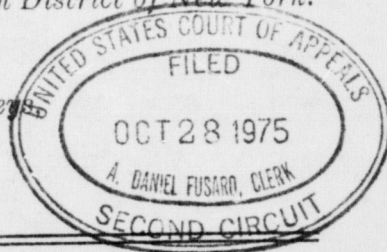




TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	2
HISTORY OF PREVIOUS PROCEEDINGS	
A. First Trial (August, 1971)	2
B. Lucchetti's Post-trial Statements (August 1971-October 1972)	3
C. Motion Pursuant to Title 28, U.S.C. §2255 (July 22, 1974)	14
D. Bail Proceedings	16
FIRST RETRIAL BEFORE JUDGE MISHLER (May 2, 1975 to May 13, 1975)	
A. Suppression Hearing	17
B. Mistrial	21
SECOND RETRIAL BEFORE JUDGE WEINSTEIN (May 19, 1975 to May 22, 1975)	
A. Suppression Hearing	23
B. Trial	27
ARGUMENT:	
POINT I—Appellant's post-conviction statements were properly admitted	31
POINT II—The court did not violate the mandate of Title 18 U.S.C. § 3501	40
POINT III—Judge Mishler's failure to recuse himself at the first suppression hearing did not result in a denial of due process	42

	PAGE
POINT IV—Appellant was not deprived of his rights to subpoena witnesses	48
POINT V—Statements made by the government in summation were “fair comment”	52
POINT VI—The court properly allowed the accomplice testimony to stand even after an invocation of fifth amendment rights	54
POINT VII—Sufficient evidence was produced as to the use of a dangerous weapon required by 18 U.S.C. § 2113(d)	57
POINT VIII—Appellant was not deprived of his right to a speedy trial	58
POINT IX—The government had jurisdiction to prosecute	59
POINT X—Appellant’s Rule 29 motion was properly denied on the merits	60
CONCLUSION	63

TABLE OF AUTHORITIES

Cases:

<i>Action Realty v. Will</i> , 427 F.2d 843 (7th Cir. 1970)	43
<i>Barker v. Wingo</i> , 407 U.S. 514 (1972)	59
<i>Berger v. United States</i> , 255 U.S. 22 (1972)	43
<i>Elkins v. United States</i> , 364 U.S. 206 (1960)	39
<i>Fahy v. Connecticut</i> , 375 U.S. 85 (1963)	37
<i>Giglio v. United States</i> , 405 U.S. 150 (1971)	39
<i>Gorman v. United States</i> , 380 F.2d 158 (1st Cir. 1967)	35
<i>Gregg v. United States</i> , 394 U.S. 489 (1969)	42

	PAGE
<i>Mapp v. Ohio</i> , 367 U.S. 643 (1961)	39
<i>Mares v. United States</i> , 260 F. Supp. 741 (D.C. Colo. 1966), reversed on other grounds, 383 F.2d 805 (10th Cir. 1967)	58
<i>Miranda v. Arizona</i> , 384 U.S. 436 (1966)	31, 32
<i>Napue v. Illinois</i> , 360 U.S. 264 (1959)	37, 39
<i>Nardone v. United States</i> , 308 U.S. 338 (1939) ..	39, 40
<i>Rosen v. Sugarman</i> , 357 F.2d 794 (2d Cir. 1966) ...	43
<i>Santobello v. New York</i> , 404 U.S. 257 (1971)	37
<i>Silverthorne Lumber Co. v. United States</i> , 251 U.S. 385 (1920)	37, 39, 40
<i>Toles v. United States</i> , 308 F.2d 590 (9th Cir. 1962)	58
<i>United States v. Aiken</i> , 373 F.2d 294 (2d Cir.), cert. denied, 389 U.S. 833 (1967)	57
<i>United States v. Ball</i> , 163 U.S. 662 (1896)	61
<i>United States v. Barry</i> , Slip Op. No. 1083 (2d Cir. June 18, 1975)	40, 41
<i>United States v. Bennett</i> , 495 F.2d 943 (D.C. Cir. 1974)	40, 41
<i>United States v. Cardillo</i> , 316 F.2d 606 (2d Cir.), cert. denied, 375 U.S. 822 (1963)	57
<i>United States v. Cobbs</i> , 481 F.2d 196 (3rd Cir.), cert. denied, 414 U.S. 980 (1973)	32
<i>United States v. DeAngelis</i> , 490 F.2d 1004 (2d Cir. 1974)	54
<i>United States v. Drummond</i> , 354 F.2d 132 (2d Cir. 1965), cert. denied, 384 U.S. 1013 (1966)	32
<i>United States v. Foddrell</i> , Slip Op. No. 978 (2d Cir., July 28, 1975)	42

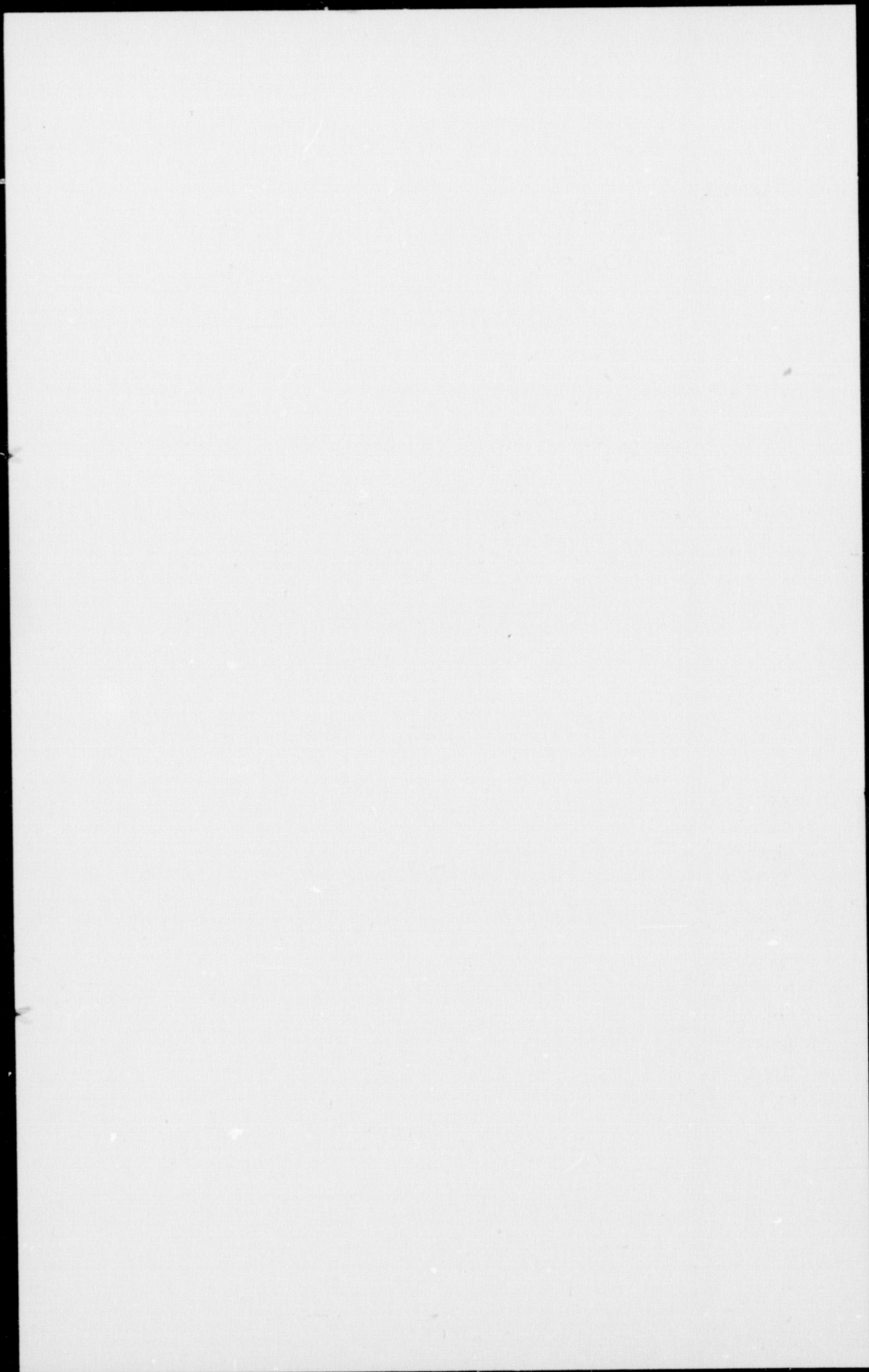
	PAGE
<i>United States v. Harris</i> , 460 F.2d 1250 (9th Cir. 1972)	58
<i>United States v. Irvin</i> , 354 F.2d 192 (2d Cir. 1965), cert. denied, 383 U.S. 967 (1966)	57
<i>United States v. Johnson</i> , 401 F.2d 746 (2d Cir. 1968)	58
<i>United States v. Kahn</i> , 366 F.2d 259 (2d Cir.), cert. denied, 385 U.S. 948 (1966)	57
<i>United States v. Nathan</i> , 476 F.2d 456 (2d Cir. 1973)	36
<i>United States v. Owens</i> , 263 F.2d 720 (2d Cir. 1959)	57
<i>United States v. Ramey</i> , 414 F.2d 792 (5th Cir. 1969)	58
<i>United States v. Roca-Alvarez</i> , 451 F.2d 843 (5th Cir. 1971)	43
<i>United States v. Solomon</i> , 509 F.2d 863 (2d Cir. 1975)	36
<i>United States v. Small</i> , 472 F.2d 817 (2d Cir. 1972)	42
<i>United States v. Tateo</i> , 377 U.S. 463 (1964)	60, 61
<i>United States v. Wilner</i> , Slip Op. 561 (2d Cir. Sep- tember 10, 1975)	53
<i>United States v. Wolfish</i> , Slip Op. 1167 (2d Cir. August 14, 1975)	53
<i>United States v. Williams</i> , 484 F.2d 176 (8th Cir. 1973)	41
<i>Wickline v. Slayton</i> , 356 F. Supp. 140 (E.D. Va. 1973)	39
<i>Wolfson v. Palmieri</i> , 396 F.2d 121 (2d Cir. 1968) ..	43
<i>Wong Sun v. United States</i> , 371 U.S. 471 (1963) ..	38, 39

Statutes:

Title 18, U.S.C. § 2113(d)	57
Title 18, U.S.C. §§ 3146, 3148	16, 45
Title 18, U.S.C. § 3501	40
Title 28, U.S.C. § 2255	14, 42, 44, 59, 61

Federal Rules of Criminal Procedure:

Rule 17(b)	49
Rule 29	60, 62
Rule 34	60
Rule 35	36



United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1221

UNITED STATES OF AMERICA,

Appellee,

—against—

CHARLES LUCCHETTI,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Charles Lucchetti appeals from a judgment after trial by jury in the United States District Court for the Eastern District of New York (Weinstein, J.), convicting him, on May 23, 1975 on two counts of an indictment, charging him in one count of armed bank robbery under Title 18 U.S.C. § 2113(d) and in one count of conspiracy to commit armed bank robbery under Title 18 U.S.C. § 371. On the armed robbery count, appellant was sentenced to a twenty year term of imprisonment pursuant to Title 18, U.S.C., Section 4208(a)(2) and fined \$10,000. On the conspiracy count, appellant was sentenced to a five year concurrent term of imprisonment and an additional fine of \$5,000. Appellant is presently incarcerated on this sentence.

On appeal, appellant urges as error (1) the admission of statements made by the appellant to agents of the

Federal Bureau of Investigation and a Grand Jury; (2) the court's failure to charge on the voluntariness of appellant's statements under Title 18, U.S.C. § 3501; (3) the adoption by Judge Weinstein of Judge Mishler's findings on a prior suppression hearing which were a product of Judge Mishler's alleged bias against appellant; (4) the alleged deprivation of appellant's right to subpoena witnesses; (5) the summation of the government; (6) the admission of the testimony of one government witness and one defense witness due to their invocation of their Fifth Amendment privilege against self-incrimination; (7) the alleged failure to prove the use of a dangerous weapon under Title 18 U.S.C. § 2113(d); (8) the denial of a speedy trial; (9) the denial of appellant's motion to dismiss due to a lack of federal jurisdiction and (10) failure of the district court to grant appellant's pre-trial motion.

Statement of Facts

History of Previous Proceedings

A. First Trial in August 1971

Indictment 71 Cr. 849, the subject of this appeal, was first returned by the Grand Jury and filed with the Clerk's Office in the Eastern District of New York on July 20, 1971. On August 2, 1971 co-defendants Jack Dempsey and David Williams were severed from this indictment, and appellant was tried separately. The first trial, before the Honorable Jacob Mishler, commenced on August 2, 1971 and concluded with a guilty verdict on August 5, 1971. David Williams and Jack Dempsey, the crux of the government's case, testified that appellant was responsible for planning and aiding in the escape of Dempsey and Williams who robbed the First National Bank of Bay Shore, Bay Shore, Long Island, on December 21, 1970 of \$25,107.72 (Transcript of Trial, August 2, 3, 4, and 5, 1971).

On October 15, 1971, Judge Mishler sentenced appellant to a twenty year term of imprisonment and a \$10,000 fine on the armed robbery count and a five year concurrent term of imprisonment with an additional \$5,000 fine on the conspiracy count. On October 27, 1971 co-defendant Williams entered a plea of guilty to the conspiracy count in the indictment and was sentenced on January 7, 1972 to a five year period of probation. Co-defendant Dempsey entered a plea of guilty on October 1, 1971 to the conspiracy count in the indictment and was sentenced on January 7, 1972 to a five year term of imprisonment pursuant to Title 18 U.S.C. § 4208(a) (2).

On June 12, 1971, this court affirmed the judgment of conviction, without opinion (App. 15)* and the United States Supreme Court denied a petition for a writ of certiorari on November 6, 1972 (App. 16).

B. Lucchetti's Post-trial Statements (August 1971-October 1972)

Shortly after appellant's conviction, he began to elicit interviews from F.B.I. agents and making statements to them.

On August 10, 1971, appellant sent a letter to the Federal Bureau of Investigation in the Babylon Office on Long Island (S.M. 3-4).** As a result of this letter, Agents Long and Achenbach interviewed the appellant on September 1, 1971 at the Federal House of Detention

* Numerals preceded by the letters "App." refer to pages in the Appellant's Appendix.

** Page numerals preceded by the letters "S.M." refer to the transcript of the suppression hearing before Judge Mishler on May 2, 5, 8, 9, 1975.

(S.M. 4-5). An F.B.I. "Advice of Rights" form was read to him and appellant refused to sign it (S.M. 5). The only topic of conversation at this time was appellant's surprise that he was convicted based upon the testimony of Dempsey (characterized by Lucchetti as an illiterate and a moron) and Williams (characterized as a sexual degenerate) (S.M. 6).

A further letter, dated March 20, 1972, alleging civil rights violations in prison, was sent by appellant to the F.B.I. (S.M. 6-7).^{*} As a result of a request for interview in this letter, the F.B.I. interviewed appellant on March 27, 1972 in Suffolk County Jail (S.M. 7).^{**} Prior to any discussions about civil rights violations, appellant mentioned his brother-in-law, Larry Russo, and commented that the F.B.I. had really "took care of" him in reducing his sentence in exchange for cooperation (S.M. 8). Appellant also cryptically referred to several robberies subsequent to December 15, 1971, suggesting that he might have some information about them. When he was questioned further, however, he gave no other answer, but merely smiled (S.M. 9). Agent Achenbach took note of appellant's civil rights complaints (S.M. 10). Appellant claimed that a writ dated February 7, 1972 to the United States District Court with a copy to the United States Attorney's Office was not mailed out by the prison authorities (S.M. 302-305).

^{*} A copy of this letter as well as most of appellant's letters and the F.B.I. reports of interviews as a result of these letters are attached as an appendix to the government's "Affidavit in Opposition", dated April 11, 1975 (App. 120, 132-203). This affidavit and appendix was deemed part of the proceedings of the suppression hearing (S.M. 29).

^{**} Appellant had been removed from the federal penitentiary in Lewisburg, Pennsylvania to the Suffolk County Jail pending the disposition of the state charges involving appellant's participation in a May 13, 1971 attempted bank robbery.

After the interview, Agent Achenbach contacted the warden of Suffolk County Jail who showed the F.B.I. the mail log maintained in the jail. A letter dated February 7, 1972 had been logged as an outgoing letter. A phone call to Assistant United States Attorney Emanuel Moore also confirmed that the copy to the United States Attorney's Office had been mailed from the prison (S.M. 304).

On May 31, 1972 appellant sent another letter to the F.B.I. requesting an interview (S.M. 11).^{*} On June 5, appellant was again interviewed at Suffolk County Jail (S.M. 12). Appellant initially started to complain about an attorney and then began to discuss a bank robbery (S.M. 13). At this point, Agent Long orally advised him of his full *Miranda* rights (S.M. 13-14). When appellant was informed that he had a right to consult with an attorney, appellant specifically stated that he did not need an attorney because he was representing himself (S.M. 14).^{**} Agent Long even went further than *Miranda*, and advised appellant that he had an appeal pending before the United States Court of Appeals. Appellant merely stated that he understood his rights, had discharged his trial attorney, Kenneth Rohl, and was representing himself (S.M. 14). He never stated that another attorney (Henry Boitel) was representing him on his appeal (S.M. 14). After this, appellant told the F.B.I. that he had an affidavit from Dempsey's wife allegedly containing statements that she was told by Dempsey that Assistant United States Attorney Moore had promised Dempsey leniency in exchange for his cooperation. Appellant further qualified

^{*} This letter was addressed "Dear Artie". Agent Achenbach's first name is Arthur (S.M. 12).

^{**} Agent Long had been present during appellant's first trial and had seen how he had represented himself after he had "fired" his attorney during the course of the trial. Agent Long therefore believed that appellant was capable of representing himself during these interviews (S.M. 99).

this information by telling Agent Long that appellant's cousin was having an affair with Dempsey's wife and he could get her to say anything he wanted her to say (S.M. 14-15, 308-309). He then stated that he was in possession of some information that would be very valuable to the government. Agent Long merely stated that any information he might give would be relayed to Mr. Moore and through him to the United States District Court (S.M. 15). Thereafter, appellant complained about an allegedly faulty warrant on his extradition from Lewisburg to Suffolk County Jail (S.M. 15, 307) and he was advised to follow all his appellate remedies in this matter before pursuing his civil rights remedies (S.M. 307).

By letter dated June 8, 1972, appellant again requested an interview with Agent Achenbach (S.M. 16). On June 14, 1972 Agents Long and Achenbach conducted an interview in the Suffolk County Jail, where appellant was once again given his *Miranda* rights (S.M. 16-17). Appellant read the "Advice of Rights" form but declined to sign it (S.M. 17, 318). Appellant informed that although his letter had requested an interview to discuss alleged civil rights violations, his real reason for an interview with them was to ascertain the possibility of some consideration on his sentence in exchange for providing the F.B.I. with valuable information (S.M. 18, 316-317).^{*} Agent Long told Lucchetti that he would make arrangements for an interview with an Assistant United States Attorney (S.M. 18-19, 317).

Agent Long did in fact relay this information to Assistant United States Attorney Moore (S.M. 19).

^{*} At this interview appellant initially told the agents that he had no recreation. When they started to question him further, appellant stated "Look, this isn't really why you're here. Let me tell you why I really want to see you", and discussed the possibility of providing information (S.M. 317-318).

Another letter dated June 20, 1972 * was sent by appellant to the F.B.I. requesting an interview, which was held on June 26, 1972. Appellant complained that letters sent out were not being mailed ** and he again expressed his desire to cooperate with the F.B.I. (S.M. 20, 323). Agent Long informed him that Mr. Moore had scheduled an appointment with him on July 17, 1972.

Another letter dated June 27, 1972 requesting an interview was sent by appellant and resulted in an interview by Agents Long and Achenbach on July 17, 1972. Appellant informed in a hypothetical manner that he was in possession of certain information about robberies, a homicide, the illegal activities of a prominent Suffolk County attorney, and the illegal activities of a Suffolk County police officer (S.M. 22). Agent Long informed that Mr. Moore could not see him that day but would interview him in the immediate future (S.M. 22).

On July 21, 1972, appellant was interviewed by Agent Long and Assistant United States Attorney Moore (S.M. 22-23, 125). At this time, appellant again hypothetically offered information on various illegal activities (S.M. 23, 125). Mr. Moore responded that he could not make any promises to appellant but that any cooperation he rendered would be made known to Judge Mishler and the United States Board of Parole (S.M. 24, 125-127). Lucchetti stated that if he wanted to cooperate, he would eventually contact the F.B.I. agents by means of a letter alleging civil rights violations so that the jail personnel would not

* This letter addressed to "Mr. Artie Achenbach" stated:

"Dear Sir,

I would like to see you concerning mail addressed to the President of the United States,

Charles Lucchetti"

(Government Exhibit 9, S.M. 323).

** A discussion with the warden revealed prison policy to be that no sealed letters would be sent out (S.M. 325).

know of his cooperation with federal authorities (S.M. 33, 105).

Pursuant to another written request thereafter, Agents Long and Achenbach again interviewed Lucchetti on August 3, 1972. At the outset, appellant informed that he wanted to discuss his involvement in four bank robberies. Agent Long already knew from prior investigation the four robberies that appellant had planned (S.M. 33-34, 103). Prior to discussing each of the four robberies, Agent Long gave to Lucchetti a separate "Advice of Rights" form which appellant executed each time. After reading and executing each of the four "Advice of Rights" forms, appellant stated that he understood his rights and did not require the services of an attorney because he was representing himself (S.M. 34-35, 39). Appellant thereafter gave detailed statements as to his participation in bank robberies on March 9, 1970 (First National Bank of Bay Shore), March 20, 1970 (Security National Bank), April 20, 1970 (Security National Bank) and the robbery on this indictment on December 21, 1970 (First National Bank of Bay Shore). Appellant further implicated John Greenemeyer and Robert Chaffin * in the first three robberies as well as his own attorney, Kenneth Rohl (who had represented him in the first trial before Judge Mishler) as being the man who "washed" bank robbery proceeds (S.M. 34-44).** Prior to discussing appellant's connection in the four robberies, Agent Long not only received the

* At the time of these statements on August 3, 1972 both of these men were dead. Greenemeyer was killed by the Suffolk County police in the course of an attempted bank robbery on May 13, 1971, because he attempted to detonate a hand grenade outside the bank (T.W. 326, 344-345, 312). Chaffin, an informant for the Suffolk County District Attorney's Office, was found murdered on February 6 or 7, 1972 (S.M. 89, 103; *See History of Previous Proceedings: B. Bail Proceedings* at 16 *infra*).

** "Washing" bank robbery proceeds was exchanging possibly marked money from the robbery for clean money (T.D. 221).

executed "Advice of Rights" form from appellant, but further, warned him that he had a writ pending before the United States Supreme Court, to which appellant replied that he wanted to cooperate because he believed that the writ would be denied (S.M. 45). He then gave a detailed account of his involvement in the December 21, 1970 robbery with Dempsey and Williams, as well as his former attorney's participation in "washing" bank robbery proceeds. At this point, appellant was not sure on one of the small details in the scheme to "wash" the proceeds and Agent Long told him to "think it over" and he would continue the interview on another date (S.M. 47).

On August 8, 1972, appellant was again interviewed (S.M. 47). Appellant was given an "Advice of Rights" form prior to the agents' questioning him on the first robbery. Appellant informed Agent Long that additional rights were not necessary because he had been previously advised of his rights and that this interview was merely a completion of the interview of August 3, 1972 (S.M. 48-49). Nevertheless, Agent Long read to appellant the contents of these forms on four occasions (S.M. 49). Appellant once again informed the agents that he understood his rights and was representing himself (S.M. 49). He thereafter gave detailed statements as to each of the four robberies (S.M. 49-55).

Appellant was further interviewed on August 14, 1972 and given an "Advice of Rights" form which he executed, while again stating that he was representing himself (S.M. 56-57). He gave further details about his knowledge of Chaffin's cooperation with the District Attorney's Office and his attorney's activities in obtaining this information on Chaffin's cooperation for appellant (S.M. 57-59).

Appellant was interviewed on August 25, 1971 at which time he was again given warnings and executed a waiver stating that he desired to represent himself (S.M. 60-61). He thereafter told Agent Long that his attorney knew that his cousin Matthew Santoro had committed perjury at appellant's first trial and had also instructed the appellant to pretend to fire him during the course of the trial in the hope that Judge Mishler would declare a mistrial. He also provided further information on his attorney's illegal activities (S.M. 61-62).

Another interview was held on September 6, 1972 at which time appellant executed another waiver form and stated that he was representing himself (S.M. 64). He thereafter identified individuals from some bank surveillance photographs, and further informed that Larry Russo had recently come into possession of a large amount of money (S.M. 64-65, 68).

Pursuant to a phone call by appellant's wife, Agent Long again interviewed appellant on September 10, 1972. Warnings were given and appellant again stated he was representing himself (S.M. 66-67). Lucchetti thereafter informed that his wife Barbara was in possession of approximately \$8,000 which was proceeds of a robbery which allegedly involved Larry Russo (S.M. 67-68).

On September 11, 1972 Agent Achenbach received from Lucchetti a written consent to search his residence but informed Achenbach his wife would probably not allow the house to be searched (S.M. 70-71). Therefore, on September 12, 1972, Agent Long and Assistant United States Attorney Moore met in Moore's office with appellant, his wife Barbara and sister-in-law Elaine Switzer. A.U.S.A. Moore stated that he was interested in obtaining the money and would not prosecute either Mrs. Lucchetti or Miss Switzer for holding this money on behalf of Russo

or Santillo (S.M. 71, 128-129). Appellant thereafter had a private conversation with the two women in an adjoining room and subsequently told A.U.S.A. Moore that the women would meet with the F.B.I. agents and return the money (S.M. 72-73, 129-130). On the same day, the agents met with these women and obtained \$7,800 from them (S.M. 73).

On September 27, 1972, Agent Long again interviewed appellant for the purpose of ascertaining the whereabouts of Russo and Santillo. An "Advice of Rights" form was given to and executed by appellant (S.M. 73-74).

On October 2, 1972 appellant was interviewed and given an "Advice of Rights" form which he executed (S.M. 74-75).

On October 3, 1972, Agent Long informed Lucchetti that as requested, he had set up an interview for appellant with Patrick Henry of the Suffolk County District Attorney's Office (S.M. 76).

On October 4, 1972 appellant met with Mr. Henry in the presence of Agent Long. He was given another "Advice of Rights" form and again stated that he was representing himself (S.M. 76). Thereafter appellant gave to Mr. Henry the same hypothetical information as was given to Mr. Moore about the illegal activities of certain people in exchange for some consideration of his Suffolk County charge stemming from a May 13, 1971 attempted bank robbery (S.M. 77). Mr. Henry told him that he would take the matter under advisement and discuss the case with his superior (S.M. 77).

By letter dated October 7, 1972, Mr. Lucchetti informed the F.B.I. of more civil rights complaints and requested an interview (S.M. 78). During the same week the F.B.I. had received eight letters from inmates at

Suffolk County Jail alleging that the jail had "ten torture chambers" (S.M. 78). When Agents Long and Achenbach interviewed Lucchetti on October 12, 1972 appellant informed that he had dictated the contents of those inmate letters and had them sent out to harass the Suffolk County correction officers (S.M. 78-79). He further advised that he had obtained other affidavits from various Suffolk County inmates and was considering filing a motion for a new trial on his federal conviction based upon them (S.M. 79).

On October 19, 1972, Agent Long met appellant in the Eastern District of New York Marshal's pen. Here he introduced appellant to F.B.I. Agent Lawrence Sweeney. After Agent Sweeney left, A.U.S.A. Moore came into the pen and told appellant that he wanted appellant to testify before a grand jury. He gave appellant several of Agent Long's reports of his prior interviews with Lucchetti and told him the various questions that he intended to ask him before the grand jury (S.M. 79, 130). A.U.S.A. Moore also went over the contents of a "Waiver of Immunity" form (S.M. 131). Appellant stated that he would not object to testifying before the grand jury and stated only one condition that was to be met: under no circumstances was Mr. Rohl (or anyone else) to find out about his grand jury testimony because this would endanger his life (S.M. 79-80, 132). Appellant never mentioned the name of his appellate attorney, Henry Boitel (S.M. 82, 137) and A.U.S.A. Moore never made any promises to him that this testimony would not be used against him (S.M. 82, 137).*

* On a prior occasion, appellant informed that he could supply other corroborative evidence against his attorney when he went to the grand jury. On the date of the grand jury, however, he informed Agent Long he would provide this information upon the disposal of his case in Suffolk County (S.M. 95). This evidence was never given (S.M. 139-141).

participation in the four robberies (S.M. 133) (App. 187-201) and executed the "Waiver of Immunity" form (S.M. 136).

In November of 1972, subsequent to this testimony, appellant entered a plea of guilty to a reduced charge before the District Court in Suffolk County for the May 13, 1971 attempted bank robbery and received a sentence of one year to run concurrently with his twenty-year federal sentence imposed by Judge Mishler (S.M. 84).

On February 23, 1973, appellant, through his appellate attorney, Henry J. Boitel, filed a motion for reduction of sentence pursuant to F.R. Crim. P. 35 (App. 18) * and on March 2, 1973, Judge Mishler held a hearing on this motion (App. 28-34). After Mr. Boitel gave personal reasons for the reduction, Mr. Moore requested that this hearing be adjourned until Lawrence Russo was apprehended apparently to verify information received from appellant as to his whereabouts. He stated that if this occurred, he would reconsider appellant's motion to reduce sentence (App. 32). The court candidly stated that:

Under no circumstances will I reduce this sentence. I regard Mr. Lucchetti as one of the most dangerous criminals that ever appeared before me in this courtroom. I don't care if he can give you information that can locate Mr. Russo or not . . .

I don't want to deceive Mr. Lucchetti or Mr. Boitel. Whatever help you give to the government won't help him one featherweight here . . .

Let him appeal to the Parole Board . . . (A. 33).

* Although the supporting affirmation by Mr. Boitel indicates that appellant had discussions with Mr. Boitel concerning a sentence reduction, it in no way contains any statement as to appellant's cooperation (A. 19-24). Indeed, Mr. Boitel testified at the suppression hearing that he had not been informed of appellant's cooperation until the hearing for the Rule 35 reduction on March 2, 1973 (S.M. 291-293).

**C. Motion Pursuant to Title 28, U.S.C. § 2255
(July 22, 1974)**

It was not until July 22, 1974 that appellant moved under Title 28, U.S.C. § 2255 to vacate the judgment of conviction in the first trial due to the alleged perjury by Dempsey when he stated that no promises of leniency were offered to him in exchange for his testimony. Judge Mishler's knowledge of this perjury was also alleged (App. 39-46), in the § 2255 motion and in an accompanying motion brought to disqualify Judge Mishler from the hearing (App. 35-37). Judge Mishler declined to disqualify himself and appointed attorney John C. Corbett, to represent appellant for the hearing on October 25, 1974.* At the preliminary stages of the hearing the court heard the brief testimony of Dempsey who denied that he had made any specific deal with the government for a reduced plea to the five year conspiracy count. When the Court was about to deny this petition, the Court itself discovered a communication sent by an Assistant United States Attorney (Gary A. Woodfield) to John C. Corbett dated September 5, 1974 in which the government directed to Mr. Corbett's attention an undated notation made by Dempsey's attorney at the first trial, Simon Chrein, indicating that Dempsey "will P.G. to Conspiracy. Sentence will be after Suffolk County case and Long & Moore will put in a recommendation for light [s]entence & [c]oncurrency" (App. 98). At this point, Judge Mishler reopened the hearing on his own and heard the testimony of Simon Chrein who testified that although he made the above mentioned note he was unable to fix the date on which this information was given.

* Appellant filed a letter dated September 5, 1974 requesting that he proceed *pro se* at the hearing. The court granted the motion but directed Mr. Corbett to be present and assist appellant at the proceedings ("Memorandum of Decision and Order", December 16, 1974, App. 98).

The court recalled A.U.S.A. Moore. He testified that he had spoken with Mr. Chrein on July 20, 1971 for the first time and that on that date Mr. Chrein informed him that Dempsey was ready to cooperate. When asked what consideration he would receive for this cooperation, Mr. Moore stated that he would discuss a possible reduced plea to Dempsey with the Chief of the Criminal Division after Dempsey had testified at appellant's trial. Moore spoke directly to Dempsey on July 20, 1971 and merely informed him that his cooperation would be made known to the sentencing judge. In his findings of fact in the "Memorandum of Decision and Order" dated December 16, 1974, Judge Mishler found that Dempsey had been promised by A.U.S.A. Moore that if Dempsey cooperated, his cooperation would be made known to the sentencing judge and he would recommend to the Chief of the Criminal Division a plea to a five-year conspiracy count to cover the indictment. A.U.S.A. Moore further stated to Dempsey that his cooperation would be made known to the Suffolk County District Attorney's Office and an effort would be made to run Dempsey's state sentence concurrently with his federal one.

The court further found that Dempsey did not intentionally answer falsely when asked about his understanding with the government but that A.U.S.A. Moore "knew, or should have known, that Dempsey's answers to the questions concerning the understanding between him and the government were false" (App. 105).^{*} The court

^{*} The court further stated that "We must expect and demand of the prosecution that it understand its obligations and comply with them voluntarily. These obligations include a duty to reveal any and all representations, promises or conversations . . . which are reasonably related to the witness' credibility and his motivation for testifying. In this case Moore may not have fully realized his obligation. Moore's good faith, however, is not the issue. The only question was whether the testimony was false and whether Moore realized it to be false" ("Memorandum" *supra* at 17; App. at 106).

thereafter granted petitioner's motion and granted a new trial. Bail, originally fixed at \$75,000, was continued pending trial, to commence on January 20, 1975. (See "Memorandum of Decision and Order", dated December 16, 1974, App. 90-108).

D. Bail Proceedings

On December 24, 1974, appellant moved for and received from the Court a reduction of bail from \$75,000 surety to a \$75,000 personal recognizance bond secured by four houses and \$7,500 cash (Docket Sheet, 71 Cr. 849, App. 5). On January 9, 1975, the grand jury returned Indictment 75 Cr. 25 (charging the three prior additional bank robberies) and the government moved for additional bail on appellant based upon these additional charges (Docket Sheet 75 Cr. 25, Government Appendix at 2). Appellant's bail was increased to a \$200,000 surety bond to cover Indictments 71 Cr. 849 and 75 Cr. 25. Due to a further motion of appellant to reduce bail on January 15, 1975, the Court scheduled a full-scale hearing on bail for January 22, 1975 (Docket Sheet 75 Cr. 25, Government Appendix at 2). A full hearing was held on that date and the Court rendered its decision by "Memorandum of Decision and Order" dated January 30, 1975 (Government Appendix at 6). In the findings of facts, Judge Mishler held that the death of appellant's associate, Robert Chaffin, in February 1971 was "planned and ordered" by Lucchetti, and that Lucchetti was "a danger to the community" and "a threat to the safety of Dempsey and Williams" (Memorandum and Order at 3; Government Appendix at 8). The court further found that the Bail Reform Act, Title 18, U.S.C., §§ 3146 and 3148 made it clear that danger to the community and government witnesses was a factor in bail considerations *only* after conviction. Thus, the court allowed the release of appellant on a \$200,000 personal bond secured by the equity in four

houses, the depositing of \$7,500 cash and further conditions, one of which was that he was limited to the Town of Islip, New York (Memorandum and Order at 4-5; Government Appendix at 9).

On March 12, 1975, the government moved to forfeit appellant's bail on the ground that he violated a condition of his bond by appearing out of the Town of Islip, for the purpose of committing a bank robbery in New Jersey (Transcript of March 12, 1975; Government Appendix at 13). The court ordered the bail forfeited, to be remitted if the defendant surrendered before March 13, 1975 at 4:00 P.M. (Docket Sheet 71 Cr. 849; App. 5). Although appellant was a fugitive on the date initially set for trial, March 31, 1975, by April 3, 1975 he had surrendered and appeared before Judge Mishler at which time bail was set at a \$500,000 surety bond (Docket Sheet 71 Cr. 849; App. 6).

On April 11, 1975, appellant's retained attorney, Elliot Wales, petitioned to be relieved as counsel and this petition was granted by the court on April 18, 1975 when Allan Lashley was appointed as counsel (Docket Sheet 71 CR 849; App. 6). Later, during the suppression hearing, appellant relieved Mr. Lashley stating his desire to proceed *pro se*. The court granted this motion and instructed Mr. Lashley to be present during trial to assist appellant (S.M. 119-120).

First Retrial Before Judge Mishler (May 2, 1975 to May 13, 1975)

A. Suppression Motion.

Appellant's first attorney on the retrial, Elliot Wales, filed an "Omnibus Motion" requesting the suppression of appellant's post-conviction statements made to FBI agents and before a Federal Grand Jury (App. 109-116). In an attached affidavit appellant stated that Mr. Moore had

promised him that his grand jury statements would never be used against him and told him that it was not necessary for appellant to discuss his testimony with Henry Boitel, his appellate attorney (A. 114). The government filed an "Affidavit in Opposition" dated April 11, 1975 detailing (with the aid of an appendix) all of appellant's statements to the F.B.I. and A.U.S.A. Moore as well as Moore's prospective testimony that he never made any promises to appellant prior to his grand jury testimony and was totally unaware that Mr. Boitel was handling Lucchetti's appeal, let alone counsel appellant against advising Mr. Boitel (Affidavit in Opposition, App. at 120-204).

Judge Mishler conducted a suppression hearing on this motion on May 2, 5, 8 and 9, 1975. At this hearing Agent Long (S.M. 3-112a) and A.U.S.A. Moore (S.M. 122-223a) testified as to appellant's post-conviction statements previously detailed in this brief. (See: *HISTORY OF PRIOR PROCEEDINGS: B. Lucchetti's Post-trial Statement August, 1971-October, 1972*.) In support of his motion to suppress, appellant attempted to issue twenty-six subpoenas * for a prison psychiatrist, a medical officer, and prisoners, as well as the warden, to allegedly testify as to inhumane treatment in the Suffolk County Jail or appellant's mental ability at the time his statements were made (S.M. 227-230, 233, 234). Appellant also sought to subpoena a representative from Judge Orrin Judd's chambers to testify as to a letter he wrote complaining of civil rights violations (S.M. 234-235). The Court denied appellant's request to subpoena these witnesses on the grounds of timeliness but further stated that if appellant testified as to his mental condition or prison conditions, he would "think more seriously" about these requests to subpoena

* Appellant was allowed to bring this motion to subpoena witnesses in the absence of the government's attorney and witnesses (S.M. 228).

(S.M. 237-239). * Appellant responded by announcing that based "solely" upon this ruling of the court, he refused to testify at this hearing (S.M. 239).

The court also allowed appellant to call his former attorney Elliot Wales to testify at the suppression hearing. Wales stated that on January 17, 1975 in a conference before trial with Moore, Moore had told him that prior to Lucchetti's grand jury appearance on October 19, 1972, Moore had not called Mr. Boitel. Wales further stated that Moore told him that Moore had informed Lucchetti that he had no intention of using these statements against him (S.M. 273). Upon cross-examination, Mr. Wales admitted however that his affidavit submitted on the motion (App. at 116) had never included this last crucial statement although it did detail the other statements made by Moore which were not contested by the government (S.M. 275-277).

Appellant also called Henry Boitel for the hearing. He testified that he represented Lucchetti in his first appeal and made an application for a reduction of appellant's sentence (S.M. 278-279). Boitel stated however that he never had any discussions with appellant or Mr. Moore as to his cooperation with the government (S.M. 291-293).

Appellant also called Agent Arthur Achenbach (S.M. 298-355) who proceeded to corroborate Agent Long's previous statements. Agent Achenbach did state that appellant was hospitalized at Suffolk County Jail because he had gone on a hunger strike but was well-oriented at the time he was interviewed and never complained of any illness (S.M. 338-339). Achenbach also confirmed that

* The court did direct however that a subpoena be served on the psychiatrists in the Suffolk County Jail and on its records officer for trial (S.M. 242).

Lucchetti had told the F.B.I. agents that he had dictated the contents of the torture chamber letters (S.M. 348-349) and of his interview with the warden where the warden admitted to placing Lucchetti in a maximum security cell for twenty minutes (S.M. 349).

In rebuttal, the government thereafter recalled Mr. Moore. Being strictly warned by the court to refrain from asking leading questions (S.M. 355), Moore's attention was drawn to his meeting with Elliot Wales in February, 1965. Without any prompting Moore recounted that he told Wales at this meeting that he did not make any promises to appellant (S.M. 355-357). He related (as on direct (S.M. 138)) that although his subjective intent was not to prosecute appellant for any further crimes due to his twenty-year sentence, he never conveyed this intent to appellant, and so told Wales, when he specifically asked him this question (S.M. 357-358). Wales was informed by Moore at this meeting that the issue of further prosecutions never, in fact, came up in Moore's discussion with Lucchetti because Lucchetti's primary concern was a reduction of sentence (S.M. 359).

Thereafter, the court again asked the defendant if he wished to testify at the hearing (S.M. 374). Appellant once again refused because the Court would not allow twenty-six subpoenas to issue (S.M. 375-376). The court then made a finding that the statements were knowingly and voluntarily made and the motion was denied (S.M. 377-378). The court filed a written opinion denying the motion in the "Memorandum of Decision and Order" dated May 12, 1975 (App. at 243-265). After presenting detailed factual findings as to the nature of all the visits by the agents to appellant, the Court found:

Lucchetti initiated the plan that resulted in his admissions being made available. He invited the agents to the interview to explore the possibilities

of relief from his sentence. He attempted to exploit the interest of the state and federal prosecutors by offering them either false or unreliable information relating to violent crimes in which a prominent Suffolk County attorney allegedly participated. He fed the agents bits and morsels of useless information in the expectation of consideration from the state and federal prosecutors . . . Since he was offering testimony against his lawyer, he felt it necessary to impress upon the federal agents his refusal to be represented by a lawyer in these negotiations. He now claims that his appellate lawyer Henry Boitel represented him in the above matter. The weakness in this position is further underscored by examining the subject matter discussed in the interviews and before the grand jury. If Boitel represented Lucchetti, that representation was confined to the robbery of the First National Bank of Bay Shore on December 21, 1970, since it was the conviction for that robbery which Lucchetti was appealing; it did not relate to the other crimes in which his admissions implicated him. Lucchetti made a knowing and intelligent waiver of his right to counsel. The government bears a heavy burden in proving that such waiver was effected; in this case, it has sustained that burden. ("Memorandum" at 11-12; App. at 253-254).

B. Mistrial Before Judge Mishler

Trial was scheduled to commence on May 12, 1975. On that date, as the jury selection was about to commence, appellant expressed his desire to reopen the suppression hearing for him to testify (T.M. 3-4).^{*} Judge Mishler refused to reopen the hearing since his decision

^{*} Numerals preceded by T.M. refer to the trial commenced before Judge Mishler on May 12 and 13, 1975 which resulted in a mistrial.

to close the hearing had already been made after repeated requests by the court to appellant as to his desire to testify (T.M. 3-4).

At trial, the bank witnesses, Frederick Badenious, (T.M. 32-58); Michael Golden (T.M. 58-87) and John Sable (T.M. 87-95) testified that the First National Bank of Bay Shore, a federally insured bank, was robbed by two men on December 21, 1970 of \$25,107.72 (T.M. 33, 60), that appellant's wife Barbara was employed at this bank from October 6, 1967 until June 1, 1967 (T.M. 41) and that appellant had a safe deposit and a checking account in that bank (T.M. 67-69). The co-defendant David Williams also testified that he and Jack Dempsey robbed the First National Bank of Bay Shore pursuant to the planning and the instructions of the appellant (T.M. 96-132). Agent Long testified as to the statements made by appellant on August 3, 1972, August 9, 1972, and October 19, 1972 (T.M. 245-247). Prior to his testimony the government sought to bring before the jury the fact of appellant's lengthy sentence to establish appellant's motive in speaking with the agents; i.e., a desire to reduce his sentence (T.M. 248-249, 254-258). The court agreed that appellant's motive was "inexplicably tied in with the voluntariness of his confession" (T.M. 249) but was also tied in with the fact of a prior conviction which the court found would have a strong prejudicial effect on the issue of guilt or innocence (T.M. 249, 258-262). Accordingly, the government was precluded from mentioning the conviction, a sentence or even the location in which these statements were made (T.M. 262-263). The government was allowed to put into evidence appellant's grand jury statements about all four robberies (T.M. 263, 265).

The prosecutor thereafter read to the jury appellant's grand jury minutes of October 19, 1972 (T.M. 313-326). At the close of these minutes, the prosecutor inadvertently read "Question: Mr. Lucchetti, you are convicted . . ."

and stopped to turn the page.* The court excused the jury and ordered this portion of the grand jury minutes deleted, (T.M. 327-328). When the jury returned, the court inquired of them if anyone heard the last phrase read to them. Only one of the jurors responded "Mr. Lucchetti, you were convicted" (T.M. 329-330). Thereupon appellant moved for a mistrial (T.M. 331) and the court granted the motion (T.M. 332).**

Second Retrial Before Judge Weinstein (May 19, 1975 to May 22, 1975)

A. Suppression Hearing

The trial of appellant was reassigned to Judge Jack B. Weinstein and commenced on May 19, 1975. At that time appellant requested that the suppression hearing be reopened (S.W. 9).*** Judge Weinstein reopened the hearing and allowed appellant to testify as well as to once again call Emanuel Moore (S.W. 8-11). Appellant testified that after he had been transported to the Suffolk County Jail on January 25, 1972, he was locked in a "hole"**** for a seven-day period. He was in the Suffolk

* The court reporter transcribed the completed word "convicted", the court merely heard the first syllable and the prosecutor stated that she said the word "con" and formed the letter "v" immediately prior to stopping (T.M. 330-331).

** For a brief summary of the proceeding before Judge Mishler, see "Memorandum to Hon. Jack B. Weinstein" dated May 14, 1975 from Judge Mishler (A. 278-281).

*** Numerals preceded by "S.W." refer to the transcript of the reopened suppression hearing before Judge Weinstein on May 19, 1975.

**** Appellant described the "hole" as 15 detention centers where you are allowed an hour a day recreation and are allowed out for a shower. A mattress is provided from 6 P.M. to 6 A.M. (S.W. 20). He later drew a distinction between the "hole" and detention centers, claiming that the detention centers were three cells isolated from the rest of the population used to segregate individuals withdrawing from alcoholism, drug addiction or mental disorders or inmates merely waiting to be transferred (S.W. 24).

County Jail awaiting a state trial from January 25, 1972 until November 14, 1972 (S.W. 12). He was placed in a "detention cell" on numerous occasions and three times for a two-day period due to his own hunger strike (S.W. 13-14, 39).^{*} Appellant further testified that for seven months prior to the June 14, 1972 interview with the F.B.I., he was in a "detention center" (S.W. 24-25) and that on June 19, 1972 for a short period of time he was placed in a "torture chamber", which had a steel box with a concrete slat to sleep upon (S.W. 26).

The appellant also alleged that sealed envelopes addressed to the President of the United States, the United States Department of Justice, Civil Rights Bureau and Louis J. Lefkowitz were never mailed (S.W. 14-16).^{**} Appellant also claimed that envelopes addressed to an attorney were never sent by officials (S.W. 17).

Appellant alleged that during the course of the interviews with the F.B.I. agents, they told him "Why don't you talk to Manny Moore? Get a sentence reduction. We'll get you this" (S.M. 28). And that they could get him out of the Suffolk County Jail (S.W. 29). On the date that appellant spoke with A.U.S.A. Moore, appellant claimed that Moore promised to get him a sentence reduction, told him that they would not prosecute him further and that nothing he stated before the grand jury would be used against him (S.W. 28). Appellant claimed that when the agents came to interview him, they merely placed four pieces of paper in front of him and told him "here, sign these. It is just a formality. Don't worry about it, just sign it" (S.W. 30). He claimed that each waiver he signed was accompanied by the agents' statements that he should not worry but just sign the paper (S.W. 30-32).

^{*} Appellant wrote to the Suffolk County Board of Health complementing the medical staff at the jail for medical attention (S.W. 40).

^{**} This fact was uncontested. See note at 7 *supra*.

Lucchetti further alleged that A.U.S.A. Moore never showed to appellant the "waiver of immunity" form prior to entering the grand jury (S.W. 33).

Appellant further stated that he was sentenced on November 14, 1972 to a one-year concurrent sentence in Suffolk County due to the recommendation of Agent Achenbach (S.W. 34). Appellant denied that he had ever told the agents that he would write civil rights letters as a way to induce them to come down for an interview (S.W. 36) or as a form of harassment to prison officials (S.W. 37), but did admit that he understood the agents' questions and had no difficulty in talking with them (S.W. 46).

After appellant's testimony, he sought to subpoena numerous witnesses to testify as to the prison conditions in Suffolk County Jail and his mental condition (S.W. 48).

Judge Weinstein stated that it was not necessary to bring in Suffolk County personnel since the Court was fully familiar with that prison "due to extensive hearings" held by the court concerning that prison (S.W. 49). Appellant then requested that he be allowed to bring in the warden and associate warden. Judge Weinstein stated that he had visited all parts of the prison (S.W. 50) and since the government had produced the full medical reports from the prison (S.W. 49) additional psychiatric testimony would only be cumulative because any psychiatrist called would have to rely upon these medical reports (S.W. 51). Furthermore, the medical reports which diagnosed appellant as a "sociopathic personality" did not give any evidence of appellant's incompetency (S.W. 51). The Court also stated that he would accept as true appellant's statements as to the detention cell (S.W. 52) and appellant's attempt to seek the assistance of Hon. Orrin G. Judd by writing him a letter (S.W. 53).

Thereafter Mr. Moore once again testified and was once again questioned on promises made to appellant and events stemming from the turning over of \$ 3500 material at the first trial (S.W. 54-71).*

At the close of this testimony the court stated:

I reread Judge Mishler's full Memorandum of Decision and Order of May 12th, dealing specifically with this problem of suppression as well as his Memorandum of May 12th dealing with other motions made by the defendant;

Nothing that has been said here would lead me to believe that any decision of his would be changed in the slightest;

The information adduced today concerns the accuracy of the finding of fact and law.

No promises were made to the defendant that the testimony he gave would not be used against him;

He knowingly executed the waiver;

He did not execute them because of any force, coercion, threats or brutality and at the Suffolk County jail there was no psychiatric basis for believing that he was not fully aware and voluntarily executed these documents.

There simply is no basis for a motion to suppress here.

* Moore also testified that appellant was "quite normal" on the day of the grand jury, "understood exactly what was going on", was not tense, did not appear to be suffering from malnutrition, showed no signs of mental instability or brutality and never complained about brutality in jail (S.W. 70-71).

B. Trial

Trial was commenced on May 20, 1975 before Judge Weinstein. At the outset, the Court limited the government in admitting appellant's grand jury minutes to statements concerning the December 21, 1970 robbery (T.W. 85).^{*} Judge Weinstein also precluded the government from admitting into evidence the fact of appellant's prior conviction or sentence (T.W. 87).

The bank witnesses, Frederick Badenious (T.W. 105-153), and John Sable (T.W. 172-182) testified as they had at the first retrial and an additional bank employee, David Gierash (T.W. 155-172) also testified as to the manner in which the bank's loss gure was ultimately discovered.

The government's main witness at this trial was co-defendant Jack Dempsey (T.W. 182-374). He admitted to robbing the bank on December 21, 1970 with David Williams and appellant (T.W. 183).

Appellant first mentioned the topic of bank robbery to Dempsey approximately one week before the robbery. He informed Dempsey that "the bank was easy" because there were no cameras or Security Guards. Appellant knew of the security in the bank because his wife had formerly worked there (T.W. 191). Several days before the robbery Dempsey and Williams met at appellant's house, where appellant instructed them that they would have to go out and steal a car to use in the "get-away" (T.W. 192). Williams and Dempsey thereupon stole a 1969 blue Oldsmobile with a black vinyl top from the Nar-ragansett Inn parking lot (T.W. 192-194). They placed

^{*} Numerals preceded by "T.W." refer to the transcript of the trial before Judge Weinstein on May 20, 21, and 22, 1975.

the car in a location given to them by appellant, returned to appellant's home and gave him the keys to the stolen car (T.W. 194). The following day, appellant drove Dempsey to the area of the bank to show him its location (T.W. 196). After they returned, appellant gave Dempsey money to buy two ski masks which were to be used in the robbery (T.W. 197).

The following day, appellant, Dempsey and Williams went on another "dry run" passed the bank in appellant's car (198-199). Appellant kept repeating that the bank was easy, they could not get caught and mentioned that since it only took the police and F.B.I. one minute to answer a robbery call, they would have to be out of the bank in one minute (T.W. 199-200). He further instructed them to rob the bank at 11 A.M. because there would be a grey or a green box with the night receipts in it with over \$100,000 in it (T.W. 200-201).

On the morning of the robbery, Dempsey and Williams met at appellant's house at 8 A.M. (T.W. 201-202). Appellant gave further instructions that Williams would have the gun and was to get the people to lie on the floor while Dempsey was to jump over the counter and take the money (T.W. 202). Before the robbery appellant took them on another "dry run" in appellant's car. They went past the bank to a location on the Southern State Parkway where appellant instructed that he would be waiting for them at that location (T.W. 202-203) so that Dempsey and Williams could hand him a mail bag in which the guns and the money would be placed (T.W. 204). On the "dry run" appellant took them to another location on the Southern State Parkway, the 5th Avenue exit. Appellant informed them that another car (the "switch car") would be waiting for them here facing in a direction opposite to the one from which they were coming (T.W. 204-205).

They all returned to appellant's home at which time appellant handed to Williams a .38 revolver and a mail bag (T.W. 205), Williams took the gun, removed the bullets and then wiped the gun and the bullets off (to remove fingerprints), he then reloaded the gun (T.W. 206-207).

Appellant then drove Dempsey and Williams to the location in which the stolen car had been placed (T.W. 207). Appellant gave the keys to Williams (T.W. 209). Dempsey and Williams drove in the stolen car to the bank where they both entered it and robbed it (209-211). Dempsey found a grey metal box (as described by appellant) but left it when it would not fit into the mail bag (T.W. 210). When Williams had counted out 46 seconds he told Dempsey of that fact (addressing Dempsey with a fictitious name "Moe" given to him by appellant) and they both quickly left the bank after obtaining a quantity of money from some tellers drawers (T.W. 210-212). As they entered their car two or three shots were fired at them.* They hurriedly proceeded to the first meet location where they saw appellant parked in his car. They pulled up alongside that of the appellant and gave him the mail bag with the money, ski masks and the gun (T.W. 213). They continued on the second location but drove accidentally past it (T.W. 214). They abandoned this car in a wooded area along with coveralls and gloves they had worn during the robbery (T.W. 215). They then walked to a car lot managed by appellant's sister-in-law, Joan Miller, borrowed a car from her and returned to appellant's house (T.W. 215).

As they entered appellant's basement, the money from the robbery had been on the floor (T.W. 216). All three then sorted the money out and counted it to be a little

* This is corroborated by the testimony of a bank messenger, John Sable who fired the shot (T.W. 174).

over \$20,000 (T.W. 217). Neither Dempsey or Williams received money that day because appellant wanted to "wash" it (T.W. 221). Dempsey ultimately was paid \$5,000 and given a \$700 automobile (T.W. 218).

Dempsey was shown a .38 caliber handgun at trial and identified it as similar in caliber and coloring to the gun used in the robbery (T.W. 222-223). The gun was admitted into evidence with a limiting instruction from the court (T.W. 223-224).

Mr. Dempsey was extensively cross-examined by appellant (T.W. 233-362).

Agent Long also testified as to appellant's statements concerning the December 21, 1970 robbery made to the F.B.I. agents on August 3, 1971 (T.W. 379-383), on August 8, 1972 (383-385), October 19, 1972 (386-388).

The government thereafter read limited portions of appellant's testimony before the grand jury (T.W. 411-4117) and rested its case (T.W. 424).

On defense, appellant read into evidence the testimony of Joan Ruth Miller from his 1971 trial (T.W. 570-580), the testimony of Bedrich Phillips from the 1971 trial (T.W. 486-490) and the prior testimony of a bank witness, Michael Golden, from the 1975 mistrial before Judge Mishler (T.W. 429-457). Appellant also called as his witness, Emanuel Moore (T.W. 458-485), co-defendant David Williams (T.W. 506-569), Special Agent Wiebke (T.W. 499-506), and Dempsey's former attorney Simon Chrein (T.W. 495-499). None of these witnesses contributed to appellant's defense.

Lucchetti did not take the stand at trial.

ARGUMENT

POINT I

Appellant's post-conviction statements were properly admitted.

Appellant claims that his post-conviction statements were improperly admitted because 1) the totality of the circumstances indicated that the statements were "psychologically" coerced; 2) the totality of the circumstances indicated that appellant was reasonably led to believe that the statements would never be used against him; 3) the statements were induced by a government promise that was never fulfilled; and 4) the statements were a product of the original assistant's error in suppressing Jencks Act material at the first trial.

(1)

It should be noted at the outset that the Federal Bureau of Investigation agents and A.U.S.A. Moore fully complied with the requirements under *Miranda v. Arizona*, 384 U.S. 436 (1966). Not merely once, but on repeated occasions, *Miranda* warnings were given to him by the Federal Bureau of Investigation and A.U.S.A. Moore prior to, and even during, appellant's grand jury testimony on October 19, 1972. Not only were *Miranda* warnings given but Agent Long even went so far as to warn appellant of the pendency of his appeal before the United States Court of Appeals for the Second Circuit and of a Writ of Certiorari before the United States Supreme Court. *Miranda* holds that although the government has the burden of showing that appellant's waiver is truly informed and voluntary, an "express statement that an individual is willing to make a statement and does not want an attorney, followed closely

by a statement, could constitute a waiver". *Miranda v. Arizona*, *supra*, 384 U.S. at 444, 475. See also, *United States v. Drummond*, 354 F.2d 132, 148 (2d Cir. 1965) (en banc), *cert. denied*, 384 U.S. 1013 (1966); *United States v. Cobbs*, 481 F.2d 196, 200 (3d Cir.), *cert. denied*, 414 U.S. 980 (1973).

Here, it is clearly evident that at the agents' first meeting with Lucchetti he chose to exercise his *Miranda* right to remain silent by refusing to make any statements. Later on he evidenced his understanding of his *Miranda* rights by posing hypotheses to the agents and the prosecution in exchange for consideration in his sentence without giving any explicit information. Finally after consultation with A.U.S.A. Moore on July 21, 1972, appellant sought by letter to obtain an interview with the agents, made an explicit expression of cooperation after executing numerous waiver of rights forms, and demonstrated his further cooperation by testifying before the grand jury at which time he executed a waiver of immunity (containing *Miranda* warnings). It would be difficult indeed to discover any case in which the government agents and prosecutor made a greater effort to comply with the requirements of *Miranda*.

Appellant now argues, however, that despite the efforts in complying with *Miranda*, the totality of the circumstances indicates that the statements were the product of "psychological coercion" because of the "brutally inhumane treatment" he received at Suffolk County Jail (Appellant's Brief at 32).

On the contrary, neither the record nor the findings of Judge Mishler and Judge Weinstein indicate that appellant was in any way psychologically coerced by prison authorities to cooperate with the federal authorities.

As Judge Mishler found, appellant's true motivation in seeking interviews with the Federal Bureau of Investigation and the prosecution was to explore the possibilities of relief from his federal sentence and possible consideration on his state charges. He repeatedly "fed the agents bits and morsels of useless information in the expectation of consideration from state and federal prosecutors" (Memorandum of Decision and Order dated May 12, 1975 at 11; App. at 253).*

Furthermore, there is nothing in Judge Weinstein's factual findings to substantiate appellant's claim that his "brutal" prison environment coerced his cooperation.

Judge Mishler had initially found that appellant wrote letters alleging civil rights complaints as a pretext to gain the attention of the federal agents and to protect himself from verbal or physical assaults from other inmates (Memorandum at 3, App. at 245). Appellant also stated to Agents Long and Achenbach that he induced other inmates to file civil rights complaints to harass prison authorities. At the suppression hearing before Judge Weinstein, appellant gave a detailed account of the days he spent in the "detention centers", a partial day in the "hole", and of the days he spent in the hospital (admittedly due to his own hunger strike). He claimed that his civil rights complaints were valid (S.W. 16) and that Agent Long promised him that he would get him out of the Suffolk County Jail (S.W. 29). Appellant thereupon attempted to subpoena the warden and the assistant warden to have them describe the "hole" and the "detention cell". Judge Weinstein thereupon stated that he had "visited all parts of that jail" (S.W. 50) and would accept as true appellant's statement as

* Appellant did in fact receive a reduced charge and a sentence of one year in Suffolk County Court due to Agent Achenbach's statements on his behalf (S.W. 34).

to the location of these cells (S.W. 52). When appellant sought to subpoena representatives from Judge Orrin Judd's chambers to attest to the fact that he had sought Judge Judd's assistance in civil rights complaints (S.W. 52), Judge Weinstein stated that it was not necessary, and that he would "accept [appellant's] statement as to what you did" (S.W. 52).

Thus Judge Weinstein never accepted as true appellant's entire version of the allegedly "brutal" incarceration at the Suffolk County Jail, but only the location of the various cells in the institution and appellant's attempts to elicit the assistance of another United States District Judge in more civil rights litigation. Judge Weinstein did reaffirm Judge Mishler's prior decision stating that "[n]othing that has been said here would lead me to believe that any decision of [Judge Mishler's] would be changed in the slightest". Judge Weinstein further found that appellant "did not execute [the waivers] because of any force, coercion, threats or brutality and at the Suffolk County Jail there was no psychiatric basis for believing that he was not fully aware and voluntarily executed the documents" (S.W. 72).

Thus there was nothing in the totality of the circumstances that indicated that appellant was psychologically coerced into giving the statements.

(2)

Appellant further argues that the "totality of circumstances" reasonably led him to believe that his statements would never be used against him. The government concedes that due to the fact of appellant's twenty-year sentence, Assistant U.S. Attorney Moore in 1972 had no subjective intent to prosecute appellant any further. The crux of the government's position, however, is that it in no way led appellant to arrive at this conclusion. Judge

Mishler found that the only promises made by any government official prior to appellant's post-conviction statements were:

- (1) that his cooperation, if valuable, would be made known to the sentencing judge in the event that an application for a reduction in sentence was made;
- (2) that his cooperation would be made known to the United States Parole Board if the information is valuable and
- (3) that Lucchetti's appearance before the grand jury would not be revealed to Kenneth Rohl. (Memorandum at 14, App. at 256).

In reaffirming Judge Mishler's findings of fact, Judge Weinstein also found that "[n]o promises were made to the defendant that the testimony he gave would not be used against him" (S.W. 72). Not only did appellant sign *Miranda* waiver forms on many occasions, but he also executed before the grand jury a waiver of immunity which included *Miranda* warnings and the specific warning:

"I wish to advise you that you are a prospective defendant and that anything you might say before the grand jury could be used against you in a later proceeding or proceedings" (T.W. 413).

Absolutely nothing in the manner or speech of the government officials induced the appellant to believe that he was free from any further use by the government of his testimony. Rather the appellant took a calculated (and reasonable in light of the history of this case) risk that these statements would not be used against him but would aid him in obtaining a sentence reduction. "Bowling to events, even if one is not happy about them, is not the same thing as being coerced." *Gorman v. United States*, 380 F.2d 158, 165 (1st Cir. 1967). "The rule excluding

involuntary confessions does not protect against hard choices where a person's serious misconduct has placed him in a position where these are inevitable." *United States v. Solomon*, 509 F.2d 863, 872 (2d Cir. 1975).

(3)

Appellant's third argument that his statements were the product of an unfulfilled promise is not supported by the factual findings of the district court and is equally meritless.

Judge Mishler found that appellant failed to provide additional information in his possession which would have been of value to the government (which was part of appellant's agreement) and that the government did not violate the terms of its understanding with appellant (Memorandum of Decision and Order, dated May 12, 1975 at 14; App. at 256).

The district court's finding is clearly supported by the testimony of Agent Long and A.U.S.A. Moore that although appellant fed the authorities bits and pieces of uncorroborated information, he never gave them the promised corroborative evidence that could have aided them in a further prosecution of his attorney (if such evidence ever existed). Accordingly, he is in no position to invoke this agreement now. See *United States v. Nathan*, 476 F.2d 456, 459 (2d Cir. 1973).

Furthermore, the government did start to aid appellant in his attempt to reduce his sentence at the Rule 35 argument held before Judge Mishler on March 2, 1973 (App. at 28-34). Mr. Moore sought an adjournment of the Rule 35 argument pending the imminent apprehension of Lawrence Russo. It was the court, and not the government, that would have nothing to do with any requests for sentence reduction. Agent Achenbach appeared on

appellant's behalf before the court in Suffolk County and aided the appellant in receiving a one-year sentence on an attempted bank robbery in which one of his accomplices was killed. With the exception of the recovery of the \$7600 robbery proceeds, no information given by the appellant (that was not already known to the F.B.I.) could ever be acted upon due to appellant's unreliability and failure to provide corroborative evidence. The government, and not the appellant, got the worst end of the bargain.

Even assuming that the government failed to live up to its assumed obligations as to a reduction of sentence in the fullest sense, it was relieved of these obligations once the district court vacated appellant's judgment of conviction (See, Memorandum at 13; App. at 255 and cf. *Santobello v. New York*, 404 U.S. 257 (1971)).

Appellant's main argument on the suppression issue is in effect an attempt to expand the exclusionary rule to new metaphysical heights. In effect it is argued that appellant's statements were a "fruit" of his lengthy sentence, which was the "fruit" of his conviction, which in turn was the "fruit" of the prosecutor's "primary illegality" in failing to disclose to the district court what the prosecutor knew or "should have known". In support of this argument appellant cites three cases: *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920); *Fahy v. Connecticut*, 375 U.S. 85 (1963); and *Napue v. Illinois*, 360 U.S. 264 (1959). However, none of these cases are directly on point.

The government would concede that appellant's statements were at least partially motivated by his desire to reduce his lengthy federal sentence. However, a very real additional reason for the cooperation was not in any way concerned with the federal conviction, i.e., appellant's desire to bring about a reduction on his *state* charge as

well.* Thus the statements were only a partial product of the federal conviction.

In addition, there was no causal nexes between A.U.S.A. Moore's actions and the conviction. Judge Mishler stated during the first retrial that if A.U.S.A. Moore had fully disclosed his "promise to consider" a lesser plea with Dempsey at trial, the outcome of the verdict would not have been changed at all: "They would have convicted [appellant] anyway" (T.M. 239-240).**

There is even less of a causal nexus between A.U.S.A. Moore's actions at the 1971 trial and appellant's decision to cooperate. Granting the prosecutor's "illegality" (for purposes of granting appellant a new trial) there is no way appellant may argue that appellant's statements were "come at by *exploitation* of that illegality." *Wong Sun v. United States*, 371 U.S. 471, 488 (1963) (emphasis added). There was no way any reasonable prosecutor could possibly foresee that his failure to disclose would result in a post-trial confession ultimately beneficial at a subsequent retrial.

Equally so, any possible "taint" that is shown by the government's "primary illegality" here is certainly dissipated by appellant's intervening and independent act of free will to cooperate after numerous *Miranda* warnings had been given. *Wong Sun v. United States*, *supra*, 371 U.S. at 491 (Wong Sun's confession several days later). Thus, when a defendant seeks to exclude a confession, after warnings are given, as a "fruit of a poisonous tree" of governmental error, there must be a strong

* A third motive was appellant's overwhelming delight in manipulating law enforcement authorities.

** Indeed, Judge Weinstein's reading of the record also confirmed this opinion (S.W. 8).

nexus such that the decision to speak is significantly affected by the prior error. *Wickline v. Slayton*, 356 F. Supp. 140, 143 (E.D. Va. 1973). Here there was no such nexus.

Nor are the policy considerations inherent in the exclusionary rule served by a suppression of this evidence. In the first place, Judge Mishler never stated that Dempsey intentionally lied at the 1971 trial, or that A.U.S.A. Moore acted in bad faith.* The Court's decision to vacate the conviction was based solely on the prosecutor's failure to adequately fulfill his responsibilities in totally disclosing the full scope of plea discussions with Dempsey as required by *Giglio v. United States*, 405 U.S. 150 (1972). (Memorandum of Decision, dated December 16, 1974, App. at 107). It appears obvious from Judge Mishler's findings of fact that neither Dempsey nor Moore understood that a "promise to consider" a lesser plea was any promise at all. Thus the government's error was one of nonfeasance rather than malfeasance.

The very purpose of the exclusionary rule is to curtail affirmative governmental activities which violate a constitutional guarantee "by removing the incentive to disregard it." *Mapp v. Ohio*, 367 U.S. 643, 656 (1961), citing *Elkins v. United States*, 364 U.S. 206, 217 (1960). Excluding evidence directly and consciously received as a result of an illegal search (*Silverthorne Lumber Co. v. United States*, *supra*, 251 U.S. 385), an illegal arrest (*Wong Sun v. United States*, *supra*, 371 U.S. 471), or an illegal wiretap (*Nardone v. United States*, 308 U.S. 338 (1939)), serves to curb these activities. Excluding appellant's statements here, however, in a highly unusual and unforeseeable retrial, would in no way deter future prose-

* In *Napue*, the court found that the accomplice witness had lied and that the government was aware of the lie. *Napue v. Illinois*, *supra*, 360 U.S. at 271.


cutors from failing to come forward with complete details of the plea negotiations with accomplices. To do so would hold appellant's volunteered statement "sacred and inaccessible." *Silverthorne Lumber Co. v. United States*, *supra*, 251 U.S. at 392; *Nardone v. United States*, *supra*, 308 U.S. at 341. Accordingly, the district court properly admitted into evidence appellant's statement.

POINT II.

The court did not violate the mandate of Title 18 U.S.C. § 3501.

Appellant argues that Judge Weinstein committed "plain error" in failing to specifically charge the jury to give such weight to the confession as the jury feels it deserves under the circumstances as required by Title 18, U.S.C., § 3501. *See, United States v. Barry*, Slip Op. No. 1083, 4117-4127 (2d Cir., June 18, 1975); *United States v. Bernett*, 495 F.2d 943 (D.C. Cir. 1974).

While the district court did not specifically instruct the jury as to the issue of voluntariness of the confessions, it did refer to appellant's contentions that his testimony was "inaccurate" and the result of governmental perjury or "other reasons that he related to you in connection with his summation" (T.W. 643-644). Later in the charges, the district court also stated that the defendant's main contention was that the accomplice witnesses were lying and "the Grand Jury testimony related to you was untrue" (T.W. 652). The district court also charged that in "weighing the testimony [given at trial, or read from a prior trial or grand jury] you may consider the relationship of the witness to the government or to the defendant, the witness' bias or interest in the outcome of the case . . . his or



her candor as you . . . deduce from the testimony that was read and the extent to which it has been corroborated or contradicted by other credible evidence" (T.W. 652). Thus the district court did specifically mention appellant's grand jury testimony in discussing the jury's weighing of the evidence. See *United States v. Williams*, 484 F.2d 176 (8th Cir. 1973); *United States v. Bernett*, *supra*, 495 F.2d at 964.

Furthermore, unlike *Barry*, neither appellant nor his counsel ever voiced any objection to the district court's charge or requested a further instruction on voluntariness (T.W. 655). Unlike *Barry* and *Bernett*,* the appellant never took the stand to either deny making statements, or to attest to their involuntary nature. Thus, the government's evidence on voluntariness remained uncontested by any evidence offered by defense. Even in summation, appellant's attack against the F.B.I. agents and Assistant U.S. Attorney Moore was not directed to any coercive tactics in eliciting his statements but was directed to charging governmental perjury and a "frame-up". (See Point V at 52, *infra*.)

Since the evidence on the voluntariness of the statements was voluminous and uncontested, any such instruction would not help the appellant but would only highlight the evidence on the confessions. Clearly, even if error, the district court's failure to specifically charge as to voluntariness did not influence the jury in returning its verdict. *United States v. Barry*, *supra*, Slip Op. No. 1083 at 4127; *United States v. Bernett*, *supra*, 495 F.2d at 962.

* In *Bernett*, the Appellate Court's primary concern was that the district court merely ascertained if *Miranda* warnings were given and did not make a specific finding on the effect of the defendant's inebriation on his waiver of these rights. *United States v. Bernett*, *supra*, 495 F.2d at 947.

POINT III

Judge Mishler's failure to recuse himself at the first suppression hearing did not result in a denial of due process.

Appellant argues on appeal that he was denied due process of law due to Judge Mishler's failure to recuse himself at the first suppression hearing, despite the reaffirmation of Judge Mishler's decision by Judge Weinstein (whose impartiality is uncontested). A reading of the prior history of the case and of the transcript, however, will simply not support appellant's claims of prejudice by Judge Mishler. On the contrary, the entire history of the proceedings demonstrates the valiant efforts by an exceedingly conscientious trial judge to adhere at all times to the letter of the law in the face of persistent attempts by the appellant to utilize legal processes to harass the court, the witnesses, law enforcement authorities and correction officers. Despite the repeated attempts to bait Judge Mishler, the district court's decisions at all times were firmly grounded in the law and supported by the credible testimony in the case.

At the outset of appellant's collateral attack under Title 28 U.S.C. § 2255, appellant sought to disqualify Judge Mishler (Note of Motion and Affidavit at App. 35-37). The district court by written opinion denied appellant's motion on the grounds that, although *Gregg v. United States*, 394 U.S. 489 (1969) precluded a district court from reading a defendant's pre-sentence report prior to conviction, the *Gregg* rationale did not apply in a situation in which a defendant was to be retried after a successful collateral attack. Cf. *United States v. Small*, 472 F.2d 818, 821 (3d Cir. 1972); *United States v. Foddrell*, Slip Op. No. 978, at 5161-5163 (2d Cir. July 28, 1975). Judge Mishler's

main reason for the denial of appellant's motion to recuse himself was the administrative difficulties in transferring a case with a complex history to another judge. (Memorandum of Decision and Order at App. 205-208).^{*} Thus, the district court did accept as true the fact that he had read the appellant's pre-sentence report and made certain comments at Dempsey's sentencing. The district court, however, was under no obligation to accept appellant's mere allegations of prejudice or bias, (See *Berger v. United States*, 255 U.S. 22 (1921); *Action Realty v. Will*, 427 F.2d 843, 844 (7th Cir. 1970)) and was obligated to test the legal sufficiency of the request to recuse (*Rosen v. Sugarman*, 357 F.2d 794, 797 (2d Cir. 1966); *United States v. Roca-Alvarez*, 451 F.2d 843, 847-848 (5th Cir. 1971)). Indeed, the district court had as much of an obligation not to recuse himself when there was no occasion to do so as there was for him to do so when there was. *Wolfson v. Palmieri*, 396 F.2d 121, 124 (2d Cir. 1968); *Rosen v. Sugarman*, 357 F.2d 794, 797-798 (2d Cir. 1966). Here the district court's decision to remain was proper, particularly in light of the fact that unfavorable information about the appellant was not from extra-judicial origins but came from the proceedings conducted in court at the first trial and prior proceedings. *Wolfson v. Palmieri*, *supra*, 396 F.2d at 124.

Furthermore, viewing all the decisions of the court (in prior proceedings as well as at the May, 1975 suppression hearing and trial) reveals that the district court's conduct was entirely free of personal bias or prejudice.**

^{*} Judge Mishler also stated that it was unfair to impose appellant's retrial on any other judge in light of the extensive amount of work involved in handling appellant's numerous motions and in coping with appellant's obstreperous personality at trial (S.M. 247-248, 256).

^{**} The rulings of the court have been held to be relevant on the issue of judicial bias. *Wolfson v. Palmieri*, *supra*, 396 F.2d at 124.

In the handling of appellant's § 2255 motion, the district court was in the forefront of protecting appellant's rights. As stated by the district court in its written decision granting appellant's motion, Judge Mishler expended a great deal of time and effort in fully investigating appellant's claims.* (Memorandum of Decision and Order, dated December 16, 1974, App. 90-108). It was the court which first discovered the significance of Simon Chrein's original memorandum on Dempsey, the court which thereupon contacted appellant's original attorney at the hearing, John Corbett, and the court which thereafter reopened the hearing. It was the court, and not the appellant,** which called Simon Chrein to testify and which ascertained further information about Dempsey's plea negotiations. Finally, it was Judge Mishler who granted the motion to vacate sentence and gave appellant a new trial.

Further evidence of the district court's lack of partiality was its reasoned opinion on the question of ap-

* Appellant's brief does a disservice to Judge Mishler in intimating that the district court had to confront appellant's claims because they included an attack upon the court's integrity due to statements made by the court on Dempsey's sentencing (Appellant's brief at 38). Judge Mishler specifically found that his statements made to Dempsey were limited to information the court gleaned after appellant's trial and went to the government's promise to dismiss the remaining counts. (See Memorandum dated December 16, 1974 at 6-7; App. 95-96). In fact, Judge Mishler "confronted" appellant's claims because he is an exceedingly conscientious trial judge who habitually goes to exhaustive lengths to find out any possible impingement on any defendant's rights.

** Appellant, now appearing *pro se*, refused to cross-examine Chrein claiming that he had been surprised on the date of this hearing on November 1, 1974. On the following day of the hearing, November 4, 1974, appellant refused to cross-examine Chrein because he had not been supplied with Chrein's testimony on November 1, 1974. (Memorandum, *supra* 10-11, App. 99-100).

pellant's bail prior to retrial. Despite the government's repeated pleas for high surety bond bail, and the court's awareness of appellant's dangerousness to the community and witnesses, Judge Mishler still afforded to appellant his complete rights to bail under the Bail Reform Act, Title 18, U.S.C. §§ 3146 and 3148 by allowing appellant to post real estate in lieu of a surety bond.* These are certainly not the actions of a biased judge.

Nor do Judge Mishler's statements at the suppression hearing ** evidence prejudice on the part of the court but rather its honest attempts to control an obstreperous but brilliant defendant who conscientiously attempted to bait the court into creating appellate error*** and engaged in delaying tactics solely for harassment purposes.

Thus the district court's repeated questioning of appellant as to his desire to testify at the suppression hearing was not an attempt to "taunt" him into waiving fifth amendment rights**** but a manifestation of the court's

* Appellant was released on January 30, 1975 and surrendered on April 3, 1975. Indictment 75 Cr. 288, charging appellant with conspiracy to rob a New Jersey bank (which robbery occurred on February 25, 1975) was filed on April 10, 1975 and is still pending.

** Judge Mishler's attitude toward appellant on his motion for a reduction in sentence on March 2, 1973 that appellant was one of the "most dangerous criminals that ever appeared before me . . ." was well grounded in fact and not the product of a bias based upon irrational considerations. (Transcript of Minutes, March 2, 1973, App. at 32-33).

*** As Judge Mishler noted, appellant chose, at times, to reserve an arguable appellate error rather than to perfect his claims at trial (S.M. 250).

**** Since appellant's statements at the hearing could not be used against him at trial, it would have been to appellant's advantage to testify here, rather than to assert his right to silence. As events proved, appellant knew this too, and requested to testify after the hearing had been closed.

desire to ascertain the length of the proceedings as well as the sincerity of appellant's claims of prior misconduct by prison officials. Thus, on the third day of the suppression hearing before Judge Mishler, appellant requested subpoenas for 26 witnesses (S.M. 227). In attempting to weigh the relevancy of the proposed offer of proof prior to issuing the subpoenas, the district court merely asked appellant if he would take the stand (S.M. 228). Appellant's reply was "It depends upon these witnesses . . ." (S.M. 228). Armed with the knowledge of Agents Long and Achenbach's testimony that appellant was not above abusing legal processes for harassment purposes,* the district court again asked appellant why he had not presented this request on the first day of the hearing. Appellant responded that he was confused about the date for the continuation of the hearing.** The court thereupon stated that it would consider appellant's subpoena request if appellant himself testified first as to his own mental state (either due to prison conditions or mental incompetency). Because of this ruling, appellant announced that he refused to testify (S.M. 239). At a later stage of the proceeding, the district court stated that appellant had no desire to testify (S.M. 264). Thereupon appellant requested an adjournment until the following day announcing that he would testify but needed extra time to obtain needed materials left at the prison (S.M. 265). The judge granted his request and postponed the hearing.

* Agent Long had previously told the court that appellant in his interviews had admitted that he "fired" his attorney at the first trial as a ploy for a mistrial, that he had manipulated other inmates to file civil rights motions to harass jailers, that he could get his cousin to have Dempsey's wife testify to anything in a motion for a new trial.

** Appellant also sought to subpoena Agent Long once again. When asked by the court why Agent Long was not cross-examined as to prison conditions on the first day of the hearing, May 2, 1975, appellant responded that he "was sick that day" (S.M. 230).

On the following day, May 9, 1975, however, appellant once again refused to testify because of Judge Mishler's ruling on the subpoenas.* The district court gave appellant ten more seconds to arrive at a decision to testify before he would order the hearing closed. Appellant conferred with his appointed counsel for a minute and one-half, at which he sarcastically remarked that he did not ask for the ten seconds (S.M. 376). At this point, the district court declared the hearing closed and made his oral findings on voluntariness. On the day of trial, May 12, 1975, true to form, appellant requested to take the stand on the motion as jury selection was about to begin (T.M. 3-4). It is incredible that appellant now argues that Judge Mishler was taunting him rather than the converse.

Throughout the suppression hearing and trial appellant displayed examples of histrionics (S.M. 167a), "snickering", (S.M. 172), violent outbursts (S.M. 238), playing to the courtroom audience (S.M. 245, 258) and continuous disrespect to the court (S.M. 122, 223-224, 244, 255, 261, 264; T.M. 252). Despite all this, Judge Mishler demonstrated impartiality even in declaring a mistrial to avoid any prejudicial effect that might have arisen from the prosecutor's slip. In short, Judge Mishler's reasoned opinion denying the suppression motion was not the product of bias but a decision well-founded upon all the credible evidence.

In addition, appellant was given more than one due process hearing. Before Judge Weinstein, appellant once again requested to reopen the hearing and was allowed to testify and to recall A.U.S.A. Moore (despite the fact that

* When appellant stated that he had been "abused" by the court, Judge Mishler declared that appellant had "abused the court more than any ten defendants I can mention, singularly and cumulatively" (S.M. 375).

he had been called to the stand on two prior occasions). Having been afforded in effect a second hearing and a second decision (by an unchallenged judge),* appellant can not now claim that he was denied due process of law on the suppression issue.

POINT IV

Appellant was not deprived of his rights to subpoena witnesses.

Appellant also argues that Judge Weinstein deprived him of his right to compulsory process for obtaining witnesses in his favor.

Nothing could be farther from the truth. At the first suppression hearing, Judge Mishler conditioned appellant's right to subpoena further witnesses upon appellant's own testimony as to his state of mind during interrogation. As argued previously, appellant was not above abusing his right to compulsory process merely for the purposes of harassment. Thus, Judge Mishler was well within the law when he found that without appellant's initial testimony as to his state of mind, the other witnesses (prison employees, inmates and judicial officials) would not be "necessary to an adequate defense" on the

* Appellant argues that since Judge Weinstein specifically stated that he had read Judge Mishler's "Memorandum of Decision" dated May 12, 1975, there is no evidence that Judge Weinstein read the transcript of the hearing. Judge Weinstein did however state that he had read the "record" on the issue of the failure to state Dempsey's plea negotiations and found that it would not have affected the jury's verdict "one whit" (S.W. 8). If the court read the transcript of the earlier trial, it would seem reasonable to assume that Judge Weinstein also read the record of the first suppression hearing several weeks earlier.

issue of the voluntariness of the statements. See F.R. Crim. P. 17(b).*

At the hearing before Judge Weinstein, appellant requested to recall Emanuel Moore, although his "offer of proof" did not include any new items of information not previously attested to by Moore on two prior occasions. Judge Weinstein not only allowed him to recall this witness but also ordered the government to produce Moore "immediately" to avoid the delays caused by subpoenas (S.W. 10).

As stated previously, appellant again sought to subpoena before Judge Weinstein prison officials, prison doctors and a psychiatrist, the warden and assistant warden, Ronald DePetris (Assistant U.S. Attorney who handled Lucchetti's first appeal) and representatives from Judge Orrin Judd's chambers (S.W. 48-52).

The district court denied the subpoena for the prison doctors and psychiatrist since a psychiatrist would be limited in his testimony to medical reports at the time of interview, which reports the government had already brought to the court (as previously requested by Judge Mishler (S.M. 242)) (S.W. 50-52).** Medical witnesses would also be particularly valueless to the suppression determination due to appellant's own testimony that he had "no difficulties in understanding" what was occurring during the interviews (S.W. 47). Thus the testimony of the prison medical staff was not "necessary" to the defense.

* At the outset of the hearing before Judge Mishler, counsel assigned to assist appellant, Allan Lashley, stated that in his opinion subpoenas to the warden and certain people in Suffolk County were not relevant (S.M. 121).

** These witnesses were also over 100 miles from the courthouse (S.W. 51-52).

Judge Weinstein also properly denied appellant's requests for prison officials because of the court's familiarity with the Suffolk County Jail and its knowledge of the location of the various detention facilities (S.W. 50-52). The district court accepted as true appellant's statement as to the locations of the cells (and even appellant's statements as to his periods of incarceration in the cell) (S.W. 52). It was therefore not necessary to call these witnesses because of the court's familiarity with the prison and the finding of fact favorable to appellant. The court apparently felt that the conditions of appellant's incarceration had no bearing on the issue of the voluntariness of his statements to the Federal Bureau of Investigation.

In addition, the court rightly held that subpoenaing the former prosecutor who argued against appellant's first brief was not relevant to the suppression issue and that subpoenaing representatives from Judge Judd's chambers to attest to the fact that a civil rights letter had been sent there was also irrelevant. (Indeed, the government had previously established that appellant wrote a variety of such letters). The district court at any rate accepted as true appellant's claims as to his invocation of Judge Judd's aid and rightfully denied appellant any subpoena power as to these witnesses.

On the other hand, at trial, Judge Weinstein went much further than most courts in insuring that appellant had adequate assistance in compulsory process.* The

* The government also aided appellant in securing testimony by producing Agent Arthur Achenbach (T.W. 80), co-defendant David Williams (T.W. 425) and Agent Donald Wiebke (T.W. 425, 499), none of whom were called by the government in its direct case. At trial, the court once again ordered the government to produce Assistant U.S. Attorney Moore, without appellant resorting to a subpoena (T.W. 425-426).

district court ordered Mr. Lashley to issue a subpoena to the bank for a complete copy of all appellant's bank records and those of the two accomplices (S.W. 73-74). The court ordered Mr. Lashley to issue a subpoena for the records of visits and telephone calls to the two accomplices at the Suffolk County Jail (S.W. 74). Appellant was also allowed to subpoena the warden, assistant warden, and psychiatrist at the jail (S.W. 75);* the Suffolk County District Attorney's Office ** (T.W. 88) and Simon Chrein (T.W. 495). When appellant discovered that the government was not calling to the stand prior witnesses Bedridge Phillips (T.W. 79),*** and Michael Golden (T.W. 83),**** Judge Weinstein allowed appellant to read their prior testimony into evidence (T.W. 427, 429-457a, 486-490). The district court also allowed appellant to read the testimony of his sister-in-law, Joan Ruth Miller, at the 1971 trial because the government could not supply appellant with her current address in order for him to issue a subpoena (T. 426, 428, 556, 570-580).***** When a witness, Dr. Beratta, whom appellant subpoenaed, did not appear (T.W. 504), the court requested, and the government stipulated, that if he were

* Judge Weinstein allowed these subpoenas, even though appellant was instructed that the testimony of such witnesses might prejudice appellant by informing the jury as to prior criminal activities (T.W. 80).

** Appellant sought to subpoena the Grand Jury testimony of David Williams which did not concern the present robbery but the May 13, 1971 attempted bank robbery in Suffolk (T.W. 88).

*** Mr. Phillips testified at the initial trial on August 3, 1971 to corroborate Dempsey's and Williams' testimony that they buried their gloves and coveralls in a vacant lot (T.W. 486-490).

**** Mr. Golden, a bank employee on vacation during the second retrial, had previously testified on May 12, 1975 as to the robbery and appellant's bank records (T.W. 429-457a).

***** Mrs. Miller testified for the defense on August 3, 1971 to rebut the testimony of Dempsey and Williams that they had borrowed a car from her on the day of the robbery (T.W. 570-580).

called he would testify that appellant visited him on December 22, 1971 for treatment (T.W. 504-505, 556).

Thus, appellant was not only afforded all available rights to subpoena witnesses, but was also given extensive assistance by the district court and the government in securing testimony he so desired. He cannot now argue that Judge Weinstein's failure to subpoena unnecessary witnesses at the suppression hearing was error, particularly in light of the fact that when appellant was allowed to subpoena prison officials for the trial, he rested without calling them to testify.

POINT V

Statements made by the government in summation were "fair comment".

Appellant claims that the statements made by the government in summation expressed a personal opinion of guilt and argued facts not in evidence, which thus deprived appellant of a fair trial.

In his summation, appellant repeatedly stated that Jack Dempsey (T.W. 590-595, 601) and David Williams (T.W. 595, 601, 603) had lied in implicating appellant.

He further alleged that Agent Long had lied to Judge Mishler in the 1971 trial (T.W. 597), in this trial (T.W. 597) and appellant was further allowed, over government objection, to refer to the activities of government employees in the Watergate Investigations in his attack on Agent Long's integrity (T.W. 598). Appellant also insinuated that Agent Wiebke lied (T.W. 606) and attacked the integrity of the former prosecutor, Emanuel Moore, claiming that Moore had originally "framed" him at the first trial (T.W. 599, 603).

In the course of his summation, appellant accused the government of "rehearsing" witnesses, rhetorically asking: "Why do they have to have meetings, secret meetings in the United States Attorney's Office, why?" (T.W. 600). Later he stated that Williams changed his testimony and asked why Williams did "not remember the story or the lines?" (T.W. 603). In referring to Dempsey, appellant asked "Did he go through a rehearsal in Miss O'Brien's Chambers or office?" (T.W. 604).

As part of appellant's general attack on the integrity of the government, appellant repeatedly stated or insinuated that the government's failure to call Williams on direct was a recognition by it that he had previously lied (T.W. 593, 595, 603). On one occasion appellant cavalierly argued that "Miss O'Brien is not Mr. Moore and would not bring David Williams into this courtroom because she saw he was so tainted . . ." (T.W. 606).

Appellant also "testified" during summation, (although he never took the stand) by asking the jurors where they were on December 21, 1970 and replying "I don't remember, I know I was not out robbing a bank" (T.W. 605).

In its summation, the government answered these attacks upon the integrity of the governmental officials. The government responded that it was "our position" that Dempsey and Williams did not lie, that they testified from their memory of the events and not "secret meetings" in the U.S. Attorney's Office, and that the government did not give these witnesses a "script to memorize" (T.W. 635-636).

Clearly this is fair comment in response to appellant's accusations of preparing scripts and having "secret meetings." See *United States v. Wolfish*, Slip Op. 1167, at 5638 (2d Cir. August 14, 1975); *United States v. Wilner*, Slip Op. 561 at 6117-6118 (2d Cir. September 10,

1975); *United States v. De Angelis*, 490 F.2d 1004, 1010-1012 (2d Cir. 1974) (Mansfield, C.J., concurring). Furthermore, the government's comments were solidly based upon Dempsey's testimony that although he had read his prior testimony he was not coaxed or rehearsed by either prosecutor, Emanuel Moore or Joan O'Brien (T.W. 235-236, 267, 271-272). Accordingly the government's summation did not deprive appellant of a fair trial.

POINT VI

The court properly allowed the accomplice testimony to stand even after an invocation of fifth amendment rights.

Appellant further argues that the testimony of the government's witness Jack Dempsey and of appellant's witness David Williams should be stricken because they invoked their privilege against self-incrimination.

On direct, in the government's case, Jack Dempsey testified in great detail as to appellant's participation in this robbery (T.W. 189-223). He also testified that on October 1, 1971 he had entered a plea of guilty to the crime of conspiracy to rob the First National Bank of Bay Shore on December 21, 1970 and that he was ultimately sentenced to serve a five-year term of imprisonment on that plea (T.W. 183-184). On the date of his testimony on May 20, 1975, Dempsey was on parole from this sentence, having served 36 months in a federal penitentiary and six months in a community treatment center (T.W. 185). In exchange for this plea of guilty to the conspiracy count and his agreement to testify before the 1971 trial, the government dismissed the armed robbery and simple robbery counts, promised to consider the reduced plea to conspiracy (which was later given to Demp-

sey),* and told him that they would inform the authorities in Suffolk County of his cooperation (T.W. 186-187). On direct, Dempsey also admitted to being convicted for a youthful offender violation involving grand larceny, a misdemeanor on a burglary charge, and a felony involving the attempted bank robbery on May 13, 1971 (T.W. 187-188).**

Upon cross-examination, appellant was allowed to extensively question Dempsey about the underlying arrests for the convictions that Dempsey had previously admitted to, even though many had no relationship to the bank robbery of December 21, 1970.*** Dempsey answered each question candidly (T.W. 233-242). Appellant also asked Dempsey about Dempsey's and Williams' participation in the May 13, 1971 robbery and received a complete admission as to their participation as well as details on previous statements, made by Dempsey, implicating appellant on this crime (T.W. 304-306, 309-315). Appellant thereupon asked: "Did you commit other crimes in Suffolk County with David Williams?" to which Dempsey responded: "I'm not going to commit myself on the other crimes" (T.W. 333). Thereafter appellant asked "you and David Williams committed other criminal activities in Suffolk County, didn't you?" and specifically asked if they committed a robbery of two factories, a bar and an automobile (T.W. 345-346). Dempsey merely refused to answer these questions (T.W. 347).****

* Even at the retrial, Dempsey insisted that this promise to consider a reduced plea was no promise at all (T.W. 186-187).

** Dempsey's three-year sentence on the attempted bank robbery charge in Suffolk was to run concurrently with his federal sentence on the conspiracy count (T.W. 188).

*** The district court cautioned the jury that it was allowing this testimony as to Dempsey's arrests because appellant was not an attorney (T.W. 238).

**** At one point, Dempsey did admit that David Williams, Charles Lucchetti and himself were "crime partners" (T.W. 307).

Essentially the same thing occurred during the testimony of David Williams (who was appellant's witness and not the government's).^{*} On the government's cross-examination of Williams, Williams corroborated Dempsey's statements as to Lucchetti's involvement in the robbery (T.W. 508-514). Williams also admitted to entering a plea of guilty to the conspiracy charge for the December 21, 1970 robbery on which he was sentenced to five years probation (T.W. 514). Prior to testifying at the 1971 trial, Williams assumed, (but was not promised) that he would receive a reduced plea for his cooperation (T.W. 559) and that his cooperation would be taken into consideration by the sentencing court on the federal and state charges (T.W. 561).^{**}

At one point appellant asked Williams if he went with Dempsey to steal a truck or perpetrate other crimes (T.W. 554-555). Williams relied on his Fifth Amendment rights.

Clearly, in both instances, the district court was justified in allowing this testimony to stand in light of these witnesses' assertion of their rights against self-incrimination. In the first instance neither appellant nor his consulting attorney requested that this testimony be stricken once the privilege was invoked.^{***}

In the second place, appellant had an exhaustive opportunity to fully explore the extent of these witnesses'

^{*} Appellant was under the impression that he could limit Williams' testimony to a mere statement that Williams was a government witness at the first trial. (T.W. 506-507).

^{**} Williams also stated that there were no "promises" made (T.W. 563-568).

^{***} The district court allowed appellant's questions as to Dempsey's unrelated criminal activity despite the government's objection (T.W. 346), but honestly answered Dempsey's question as to the possible legal ramifications (T.W. 346-347).

participation in the December 21, 1970 robbery (as well as the collateral issues on the May 13, 1971 attempted robbery). He was given a free reign in questioning all of Dempsey's arrests as well as his convictions. Exploration of all the details of all the crimes these witnesses might possibly be involved in, would not serve to contribute anything further on the issue of the witnesses credibility, but would substantially violate their rights against self-incrimination. See *United States v. Aiken*, 373 F.2d 294, 298 (2d Cir.), *cert. denied*, 389 U.S. 833 (1967); *United States v. Kahn*, 366 F.2d 259, 265 (2d Cir.), *cert. denied*, 385 U.S. 948 (1966); *United States v. Irvin*, 354 F.2d 192, 198 (2d Cir. 1965), *cert. denied*, 383 U.S. 967 (1966); *United States v. Cardillo*, 316 F.2d 606, 611 (2d Cir.), *cert. denied*, 375 U.S. 822 (1963); *United States v. Owens*, 263 F.2d 720, 722 (2d Cir. 1959).

Accordingly, the testimony of Dempsey and Williams was properly admitted.

POINT VII

Sufficient evidence was produced as to the use of a dangerous weapon required by 18 U.S.C. § 2113(d).

Appellant further argues that the conviction under Title 18, U.S.C. § 2113(d) is reversible because the evidence failed to establish that the weapon used by Williams in the commission of the robbery was operable.

There is no doubt that both Dempsey (T.W. 205-207) and Williams (T.W. 547-549) testified as to the use of a revolver in the robbery. Appellant handed a loaded revolver to Williams prior to departing for the robbery. Williams unloaded the weapon, wiped the bullets, as well as the gun, for fingerprints and reloaded it. Wil-

liams displayed the same loaded weapon to bank personnel during the commission of the robbery (T.W. 547). Dempsey identified the weapon used at trial as similar to the weapon used in the December 21, 1970 robbery (T.W. 224). Williams identified it as the same due to a scratch on the gun (T.W. 548). Cf. *United States v. Johnson*, 401 F.2d 746, 747-748 (2d Cir. 1968); *United States v. Ramey*, 414 F.2d 792, 794 (5th Cir. 1969). There was thus very strong circumstantial evidence that the weapon used was "dangerous" and "reasonably calculated to put life in danger." *United States v. Johnson*, *supra*, 401 F.2d at 747; Cf. *Toles v. United States*, 308 F.2d 590, 592 (9th Cir. 1962); *Mares v. United States*, 260 F. Supp. 741 (D.C. Colo. 1966), *reversed on other grounds*, 383 F.2d 805 (10th Cir. 1967).

In addition, the weapon admitted as an exhibit at trial is available for this court's inspection as to its operability if necessary. *United States v. Harris*, 460 F.2d 1250 (9th Cir. 1972).

POINT VIII

Appellant was not deprived of his right to a speedy trial.

Appellant argues that he was deprived of his right to a speedy trial due to the length of time from his arrest in June, 1971 until the date on which Judge Mishler granted his motion to vacate the judgment of conviction, on December 16, 1974. Although the three-year period did include his initial trial, appellant now argues that since the judgment at this trial was vacated due to the actions of the government in not fully revealing Dempsey's plea negotiations, the indictment should have been dismissed due to the pre-retrial delay.

At the outset, it should be noted that although appellant informed the F.B.I. agents that he planned to file a Title 28, U.S.C., § 2255 petition for a new trial due to promises of leniency for Dempsey on June 5, 1972 and again on October 7, 1972, he waited until July 22, 1974 (after he had served his sentence in Suffolk County) to actually file this motion. The delay occasioned by appellant's attempt to get whatever favorable consideration he might from the federal authorities while he completed his one year term in Suffolk should not be held accountable as time spent by the government.

In addition, appellant has made no showing that the time period that elapsed from the date of the offense and the 1975 retrial has resulted in any substantial prejudice. *Barker v. Wingo*, 407 U.S. 514, 532 (1972). (See, "Memorandum of Decision and Order" dated May 12, 1975, App. at 266-277).

The error of the government at the first trial was corrected by Judge Mishler's granting of a new trial for appellant, and absent any showing of prejudice due to delay, the retrial did not violate appellant's rights to a speedy trial.

POINT IX

The government had jurisdiction to prosecute.

Appellant argues that although the government has shown that the bank which was robbed was insured by the Federal Deposit Insurance Corporation, it lacked jurisdiction to prosecute because the bank in question was not federally insured against robbery and because the federal government has no proprietary interest in the Federal Deposit Insurance Corporation (See "Motion for a Directed Verdict and/or Dismissal of Indictment" dated April 30, 1975, App. at 231-236, Motion

under Rule 29, dated July 29, 1975, App. 334-349, at 340-341).

In response, the government relies on the rationale stated by Judge Mishler (See "Memorandum of Decision and Order" dated May 12, 1975, App. 266-277, at 274-275). In short, Congress has the power to confer federal jurisdiction over criminal offenses regardless of proprietary requirements created by Congress for civil suits.

Furthermore the fact that the banks usually take out theft insurance from other insurance carriers is not relevant for purposes of establishing federal jurisdiction where banks are insured by the Federal Deposit Insurance Corporation.

POINT X

Appellant's Rule 29 motion was properly denied on the merits.

Appellant further requests this court to consider his claims previously presented to Judge Weinstein pursuant to a post-trial motion under F. R. Crim. P. 29 and 34. ("Notice of Motion" and Motion dated July 29, 1975, App. 333-349). The district court denied this motion on August 6, 1975 (Notice of Motion and Endorsement, App. at 357).

Argument One in this motion charges the government's failure to prove federal jurisdiction. This has already been briefed and answered. (See Point IX, *supra*.)

Appellant's second claim in this motion was that his Fifth Amendment protection against double jeopardy was violated. Such is not the law. See *United States v. Tateo*,

377 U.S. 463 (1964); *United States v. Ball*, 163 U.S. 662 (1896).

Appellant's third contention was that the grand jury testimony of Agent Donald B. Wiebke on June 15, 1971 tainted his indictment. As appellant clearly knows, this testimony of June 15, 1971 was given to the grand jury that brought the first, underlying indictment, 71 Cr. 662, and was never brought before the grand jury that returned the indictment at issue, 71 Cr. 849, on July 20, 1971.

Appellant's third claim is a re-argument of his motion under Title 28, U.S.C., § 2255 that the government suppressed Jencks Act material. Appellant was clearly given a remedy to this action by the granting of his § 2255 motion and retrial. Appellant further argued that A.U. S.A. Moore suppressed additional evidence on his notes as to appellant's grand jury testimony at retrial before Judge Weinstein. There is absolutely no evidence to support this allegation and the government as well as Moore stated that all reports were turned over to appellant and no further memoranda existed.* The government also never suppressed, at the retrial, the grand jury testimony by David Williams as to the May 13, 1971 attempted bank robbery in Suffolk County because such testimony was never in the possession of the United States Attorney's Office (T.W. 88). This claim is equally frivolous in light of the fact that Williams was appellant's witness and the events of the May 13, 1971 attempted robbery have no bearing on the robbery in issue on December 21, 1970.

* Voluminous reports on the accomplices' prior statements on the May 13, 1971 attempted robbery were turned over to appellant at the retrial, even though they had no bearing on the December 21, 1970 trial.

Finally, appellant argues that the gun and mail bag were illegally obtained. Since they were in the possession of Dempsey and Williams and taken from them at their arrest on the May 13, 1971 attempted robbery charge, appellant does not have standing to contest their seizure. Appellant also failed to raise this issue prior to, or during, his retrial.

Appellant also requests this court to reconsider Judge Weinstein's denial of appellant's motion under F.R. Crim. P. 29 discussed previously. By endorsement, the court stated:

The motion is denied.* No material of significance not already considered by the trial court is now brought to the court's attention. Since an appeal is pending, this court, in any event, lacks jurisdiction. The clerk will inform the defendant and counsel. So ordered.

Jack B. Weinstein

(App. at 357, emphasis added).

Since the district court denied the motion on the merits, and properly so, any argument on the further statement concerning lack of jurisdiction is meaningless.

* Appellant has misread the district court's handwriting in the first sentence. A conference between the government and Judge Weinstein's deputy clerk during the preparation of the brief reinforces the government's interpretation of this sentence.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

Dated: October 22, 1975

DAVID G. TRAGER,
*United States Attorney,
Eastern District of New York.*

PAUL B. BERGMAN,
JOAN S. O'BRIEN,
*Assistant United States Attorneys,
Of Counsel.*

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

JOAN S.O'BRIEN

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

two copies

That on the 24th day of October 19 75 he served ~~xxx~~ of the within

Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Henry Boitel, Esq.

233 Broadway

New York, N. Y. 10007

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, Washington Street, Borough of Brooklyn, County of Kings, City of New York.

Joan S. O'Brien
JOAN S. O'BRIEN

Sworn to before me this

24th day of October 19 75

OLGA S. MORGAN
Notary Public, State of New York
N.Y. 2400000005
Qualified in Kings County
Commission Expires March 30, 1977